No. 93-1911

In The

Supreme Court of the United States

October Term, 1994

CINDA SANDIN, *Unit Team Manager, Halawa Correctional Facility,*

Petitioner,

vs.

DeMONT R.D. CONNER, *et al.,*

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME II, PAGES 195 TO 375

PAUL L. HOFFMAN*
**Counsel of Record*
100 Wilshire Blvd.
Suite 1000
Santa Monica, California 90401
(310) 260-9585

Counsel for Respondent DeMont R.D. Conner

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS**
KATHLEEN M. SATO
Deputy Attorneys General
State of Hawaii
***Counsel of Record*
Department of the Attorney General
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360

Counsel for Petitioner Cinda Sandin, Unit Team Manager, Halawa Correctional Facility

Petition For Certiorari Filed May 26, 1994
Certiorari Granted October 7, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS*

---

* Entries marked with an asterisk (*) are included in the appendix to the Petition for Certiorari ("Pet. App.").

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

---

* Entries marked with an asterisk (*) are included in the appendix to the Petition for Certiorari ("Pet. App.").

TABLE OF CONTENTS – Continued

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

MOTION FOR SUMMARY JUDGMENT

(Filed Nov. 20, 1989)

Defendants, through their undersigned attorneys, hereby moved this Court for an order Granting Summary Judgment in their favor in the above-entitled action on the grounds that defendants are entitled to judgment in their favor as a matter of law.

This motion is made pursuant to Rule 56(b), Federal Rules of Civil Procedure, and is based upon the attached memorandum in support of motion for summary judgment, the affidavit and exhibits, and the pleadings, records and files herein.

DATED: Honolulu, Hawaii, Nov. 17, 1989, 1989.

STATE OF HAWAII

WARREN PRICE, III
Attorney General
State of Hawaii

/s/ Frank D. J. Kim
FRANK D.J. KIM
Deputy Attorney General

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

NOTICE

Defendants have moved for summary judgment against plaintiff who is a pro se prisoner litigant. The Ninth Circuit has recently held that a district court must advise a pro se prisoner litigant of what is required in response to a motion for summary judgment under Fed. R. Civ. P. 56. *Klingele v. Eikenberry,* 849 F.2d 409 (9th Cir. June 13, 1988) (*citing, Hudson v. Hardy,* 412 F.2d 1091 (D.C. Cir. 1968)).

Therefore, Plaintiff is hereby notified that failure to respond to the summary judgment motion will result in entry of judgment in favor of Defendants. *Hudson,* 412 F.2d at 1094. A summary judgment motion is a procedural device by which one party may obtain judgment if he or she persuades the court that the existence of certain material facts is undisputed and that he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In this case, certain allegations such as challenges to particular, undisputed events may be capable of resolution as purely legal matters. For these claims, Plaintiff need only state his legal position as clearly as possible. Other claims in this action may involve factual issues where the parties disagree about whether certain incidents did or did not occur. For such factual claims, Plaintiff is required to respond to Defendants' summary judgment motion by submitting documents or factual affidavits which disagree with Defendants' showing with respect to some

material fact. Fed. R. Civ. P. 56(e). If necessary, Plaintiff may request further guidance from the court regarding the requirements of Rule 56.

Dated: Honolulu, Hawaii, Nov. 17, 1989.

Frank D. J. Kim
FRANK D. J. KIM
Attorney for Defendants

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The original complaint was filed herein on May 10, 1988. By Order dated May 26, 1989, Plaintiff was given leave to file an amended complaint which was in fact not filed until September 8, 1989. The amended complaint is essentially an entirely new suit because it does not replead Plaintiff's original claims and adds defendants. It is 17 pages long, contains 54 numbered paragraphs and names 16 defendants including the State of Hawaii. It is full of conclusory statements but little fact.

The purported gist of the amended complaint appears to be that: Plaintiff's placement at and within the Halawa High Security Facility, i.e. Plaintiff's so-called "behavior modification program," violates his Fourteenth Amendment due process rights and the Eighth Amendment prohibition against cruel and unusual punishment; security measures such as the use of mechanical

restraints, strip searches and prohibitions against unauthorized inmate communications violate his Fourth and Eighth Amendment rights; and various defendants have engaged in retaliatory acts against him in violation of his unspecified rights.

II. FACTS

Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. See Exhibit A. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape. See Exhibit B.

While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff. Exhibit C.

Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. Exhibit A. The second attempt resulted in a misconduct charge on September 4, 1984. Exhibit D. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage.

Plaintiff is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the State's most dangerous, predatory and high risk inmates. Exhibit E. Of necessity, the

high security facility is the most restrictive prison in the state system.

III. PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHTH AMENDMENT RIGHTS

A. Due Process

Plaintiff's claim that his placement at and within the various phases at the High Security Facility violated his due process rights is without merit since his placement did not affect a liberty interest subject to audit under the due process clause.

Placement of a prisoner is primarily a matter within the discretion of prison officials. As stated by the U.S. Supreme Court in *Hewitt v. Helms*, 459 U.S. 460 (1983);

> We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell, supra*, at 566, and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal

> courts." *Meachum v. Fano, supra,* at 225. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price v. Johnston,* 334 U.S. 266, 285 (1948)

459 U.S. at 467.

Inmates do not have a liberty interest in remaining in the general population of inmates or enjoying the same privileges as inmates generally. In *Hewitt v. Helms,* 459 U.S. 460 (1983) the court held that inmates had no liberty interest in being in the general population of inmates rather than in a more restricted segregation. In *Hewitt* the inmate was found not guilty of misconduct, but was required to stay in a segregated and more restrictive area for security reasons. The court held that no liberty interest was involved because the prison officials had discretion to place the inmate in any section so long as there was no cruel and unusual punishment.

Accordingly, due process requirements have not been imposed even when placement has resulted in intra- or inter-state prison transfers. *Meachum v. Fano,* 427 U.S. 215 (1976); *Montanye v. Haynes,* 427 U.S. 236 (1976); and *Olim v. Wakinekona,* 461 U.S. 238 (1983).

In *Meachum* the issue before the court was:

> The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which

> are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the concurrence of other events. We hold that it does not.

Meachum, 427 U.S. at 216.

In explaining its decision, the Court states:

> The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law. The initial inquiry is whether the transfer of respondents . . . infringed or implicated a "liberty interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .
>
> Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty

> interest to empower the State to confine him in *any* of its prisons.
>
> Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Meachum, 427 at 223-225.

See also the companion case *Montanye v. Haynes*, 427 U.S. 236 (1976) where the court upheld the transfer of an inmate, without hearing, after the inmate circulated a document in disregard of applicable prison rules. The U.S. Supreme Court extended its holdings in *Meachum* and *Montanye* to interstate prison transfers in *Olim v. Wakinekona*, 461 U.S. 238 (1983).

Nor does state law create a liberty interest entitling Plaintiff to due process protections. The U.S. Supreme Court in *Olim v. Wakinekona* expressly found that Hawaii's rules on classification, placement and transfer did not give rise to a state created liberty interest or otherwise implicate due process concerns.

In *Olim* an inmate raised due process challenges to his involuntary transfer to Folsom State Prison in California. The U.S. District Court for the District of Hawaii dismissed upon the basis that the Hawaii rules did not

give rise to a state created interest entitled to protection under the due process clause. The U.S. Court of Appeals for the Ninth Circuit reversed and held that the rules did create a liberty interest. On appeal to the U.S. Supreme Court, the court overruled the Ninth Circuit and expressly held that the state's rule (Rule IV, complementary Rules and Regulations attached hereto as Exhibit F) did not give rise to a state created liberty interest because "[t]he regulation contains no standards governing the Administrator's exercise of his discretion." *Olim v. Wakinekona*, at 243. In addressing this issue the court stated:

> The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. . . .
>
> . . . [A] State creates a protected liberty interest by placing substantial limitations on official discretion. An inmate must show "that particularized standards of criteria guide the State's decisionmakers" . . . If the decisionmaker is not "required to base its decisions on objective and defined criteria" but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all" . . . the State has not created a constitutionally protected property interest.
>
> Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi*, 63 Haw., at 144-145, . . . the prison Administrator's discretion . . . is completely unfettered. No standards

> govern or restrict the Administrator's determination. . . . [T]he Administrator is the only decisionmaker under Rule IV. . . .

Olim v. Wakinekona, 461 U.S. at 248-249.

Rule IV has been succeeded by sections 17-201-1, 17-201-2, 17-201-22, 17-201-23 and 17-201-24 of the State of Hawaii Administrative Rules. Copies of said sections are attached hereto as Exhibit G. Although the present rules are not exactly identical with Rule IV, the present rules are substantially similar to their precursor, Rule IV. The present rules do not restrict the administrator's discretion any more than did Rule IV. This similarity is *not* coincidental. A cursory comparison will reveal that the current rules provide even less basis to impute a state created liberty interest than did Rule IV.

[Material Deleted]

X. CONCLUSION

For the reasons stated above, defendants request this Court to grant their motion for summary judgment.

DATED: Honolulu, Hawaii, Nov. 17, 1989.

/s/ Frank D.J. Kim
FRANK D.J. KIM
Deputy Attorney General

Attorney for Defendants

[Caption Omitted In Printing]

AFFIDAVIT OF CINDA SANDIN

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF)
HONOLULU

CINDA SANDIN, after first being duly sworn, on oath deposes and says that:

1. She is the Residency Section Supervisor at Halawa High Security Facility and is familiar with DeMont Conner through her work.

2. Affiant is the custodian of records at Halawa High Security Facility.

3. Exhibits A through E and H through K are true and correct copies of documents in the institutional file of DeMont Conner, an inmate at Halawa High Security Facility.

4. The institutional file of DeMont Conner, as well as the institutional files of each inmate, is a business record of the Department which is kept in the regular course and conduct of its business and upon which the Department relies.

5. DeMont Conner is presently housed in Module B. The environment is clean. Wholesome food is provided, free clothing is furnished, and medical services are available. Conner may participate in two worklines (janitor or kitchen) and an education program. He has recreation

(one hour per weekday), store orders, law library, personal library, games, and color television. He receives daily monetary compensation although he is not employed.

6. The program at the High Security was designed by Laurence Shohet. He has a Masters Degree and extensive background in prison and psychiatric programs. The program was approved by the Corrections Department at the time of implementation.

7. Conner was provided with a copy of the *Inmate Handbook* which specifies what is expected of every inmate in the system. The expected behavior to progress in the program is to follow the module rules, handbook rules, and to maintain a positive and cooperative attitude with staff and other inmates.

8. The status of inmates in Disciplinary Segregation, Administrative Segregation, and Phase I is informally reviewed by the Unit Team on a daily basis. Formal reviews for Phase I are conducted every 30 days. The inmate is given written notice of the date of formal Phase I reviews. He may furnish a written statement to the Unit Team for consideration. He may also request to speak with staff. The status of inmates in the modules is reviewed periodically as needed. The inmate's custody review is conducted at least once a year by the case manager. Conner is presently in Module B. He has displayed poor self control, a disregard for the rules, and a very poor attitude throughout much of his incarceration.

9. Inmates receive one hour of outdoor recreation, five days a week, per schedule. It is impossible to provide access to the indoor gym to all inmates in the facility in

one day due to the need to separate inmates into small groups by quad for safety and security reasons. Recreation is rarely cancelled unless security or weather conditions dictate a need for cancellation.

10. For security and safety reasons, the cells in Special Holding are constructed with built-in furniture. This is to prevent suicides and assaults on staff. The food tray is completely wrapped in saran wrap prior to being slipped under the door. This method of food service is utilized as a security measure.

11. Inmates receive necessary medical and dental care. They may request psychiatric services whenever they feel the need. The facility has a psychiatrist, a psychologist, and numerous psychiatric social workers who are regularly available.

12. Weights are not in the Module A recreation yard as a safety and security precaution. Approximately one-half the Module A inmates have serious mental problems and many others are violent.

13. The inmate may order approved books through the library or from a publisher. They may be hard bound and are not required to be donated to the library. Inmates regularly subscribe to a wide variety of magazines.

14. English speaking inmates may not communicate in code or foreign languages. However Conner may pray quietly as required by his Muslin faith. He may not yell at odd hours with fellow Muslin inmates as this disturbs the sleep and routine of fellow inmates.

Further affiant sayeth naught.

/s/ Cinda Sandin
CINDA SANDIN

Subscribed and sworn to before me
this 20th day of November, 1989.

/s/ Cheryl B. DeMello
Notary Public, State of Hawaii
My commission expires: 2/23/92

EXHIBIT A

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII vs. DeMONT RAFAEL DARWIN CONNER, also known as Black Rose and Dinky, Defendant.	CR NO 57873 JUDGMENT; NOTICE OF ENTRY I: Unauthorized Control of Propelled Vehicle (HPD No. Z-28572) II: Driving Without License (HPD No. Z-30040) III: Promoting a Detrimental Drug in the Third Degree (HPD No. Z-30060)

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of GUILTY to

I: Unauthorized Control of Propelled Vehicle
II: Driving Without License

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of

I: Unauthorized Control of Propelled Vehicle
II: Driving Without License

committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 5 years; Count II: 1 year. Said sentence to be served concurrently with Cr. Nos. 59456 and 59458.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled Court [SEAL]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII	)	CR NO 49458
vs.	)	JUDGMENT; NOTICE OF ENTRY
DeMONT R. D. CONNER, also known as Black Rose and David L. Tavares, Defendant.	)	I: Kidnapping (HPD No. D-14731) II: Assault in the Third Degree (HPD No. D-14731)

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of NOT GUILTY and having been found GUILTY after a jury-waived trial of

I: Kidnapping
II: Assault in the Third Degree

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of

I: Kidnapping
II: Assault in the Third Degree

committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 20 years; Count II: 1 year. Said sentence to be served concurrently with Cr. Nos. 59456 and 57873.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled Court [SEAL]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII	)	CR NO 59456
vs.	)	JUDGMENT; NOTICE OF ENTRY
DeMONT R. D. CONNER, also known as David L. Tavares,	)	I: Kidnapping (HPD No. D-09835)
Defendant.	)	II: Terroristic Threatening in the First Degree (HPD No. D-09835-1)
	)	III: Robbery in the First Degree (HPD No. D-09835-2)

(Filed April 30, 1984)

JUDGMENT

The above-named defendant having entered a plea of NOT GUILTY and having been found GUILTY after a jury-waived trial of

I: Kidnapping
II: Terroristic Threatening in the First Degree
III: Robbery in the First Degree

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of

I: Kidnapping
II: Terroristic Threatening in the First Degree
III: Robbery in the First Degree

committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the Defendant be committed to the custody of the Director of the Department of Social Services and Housing for imprisonment, mittimus to issue forthwith and until released in accordance with the law, as follows: Count I: 10 years; Count II: 5 years; Count III: 20 years. Said sentence to be served concurrently with Cr. Nos. 59458 and 57873.

Dated: Honolulu, Hawaii, April 23, 1984

/s/ Melvin K. Soong
Judge of the above-entitled Court [SEAL]

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII	) CR NO 59460
vs.	) JUDGMENT; NOTICE OF ENTRY
DeMONT R. D. CONNER, also known as David L. Tavares and Mr. D,	) COUNT I: RAPE IN THE FIRST DEGREE
	) COUNTS II AND III: SODOMY IN THE FIRST DEGREE
Defendant.	) COUNTY IV: KIDNAPPING
	) (HPD NOS. D-02468; D-02468-1; D-02468-2; D-02468-3)

(Filed July 27, 1984)

JUDGMENT

The above-named defendant having entered a plea of not guilty and having been found guilty of all charges upon trial by jury on June 14, 1984,

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of RAPE IN THE FIRST DEGREE (COUNT I), SODOMY IN THE FIRST DEGREE (COUNTS II and III), and KIDNAPPING (COUNT IV), committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the Court that the defendant be committed to the custody of the Director of the Department of Social Services and Housing pursuant to H.R.S. § 706-661 for extended terms

of imprisonment of life as to each of COUNTS I, II, III and IV, said sentences to run concurrently.

Mittimus to issue forthwith.

Dated: Honolulu, Hawaii, July 26, 1984

/s/ Leland H. Spencer
Judge of the above-entitled Court

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
State of Hawaii

STATE OF HAWAII	) CR NO 60121
vs.	) JUDGMENT; NOTICE OF ENTRY
DeMONT R. D. CONNER,	) ORIGINAL CHARGES:
Defendant.	) I & V – ATTEMPTED MURDER
	) II & VI – ROBBERY IN THE FIRST DEGREE
	) III & VII – KIDNAPPING
	) IV & VIII – BURGLARY IN THE FIRST DEGREE
	) IX – SEXUAL ABUSE IN THE FIRST DEGREE
	) X – ATTEMPTED SODOMY IN THE FIRST DEGREE
	) (D-07255-1; D-07229; D-07255; D-07229-1; D-07255-2; D-07229-2; D-07255; D-07229-3; D-07229-4; & D-07229)

(Filed Aug. 23, 1984)

JUDGMENT

The above-named defendant having entered a plea of Not Guilty and a jury on August 22, 1984, having found the Defendant Guilty

IT IS ADJUDGED that said above-named defendant has been convicted of and is guilty of the offense of ATTEMPTED MURDER, Counts I & V; ROBBERY IN THE FIRST DEGREE, Counts II & VI; KIDNAPPING, Counts III & VII; BURGLARY IN THE FIRST DEGREE, Counts IV & VIII; SEXUAL ABUSE IN THE FIRST DEGREE, Count IX committed in the manner and form set forth in the charge.

IT IS THE JUDGMENT AND SENTENCE of the court that the defendant be committed to the custody of the Director of the Department of Social Services and Housing, OAHU COMMUNITY CORRECTIONAL CENTER, for an imprisonment term of life in Counts I & V, TWENTY (20) YEARS in Counts II & VI, TEN (10) YEARS in Counts III & VII, TEN (10) YEARS in Counts IV & VIII, and FIVE (5) YEARS in Count IX, until released in accordance with the law. Said sentences to run concurrently with any other sentence Defendant is now serving. MITTIMUS TO ISSUE FORTHWITH.

Dated: Honolulu, Hawaii, August 22, 1984

/s/ Ronald B. Greig
Judge of the above-entitled Court

AMENDED JUDGMENT
GUILTY CONVICTION AND SENTENCE
[ ] Young Adult Defendant
NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE
FIRST CIRCUIT

CASE NUMBER

CR. 84-0491

STATE OF HAWAII VS (DEFENDANT)
DeMONT RAFAEL DARWIN CONNER,
also known as David Lopaka Tavares
and Black Rose

POLICE REPORT NUMBER
H-29454

DEFENDANT'S PLEA
[X] GUILTY [ ] NOT GUILTY [ ] NO CONTEST
[ ] JURY VERDICT [ ] JUDGE FINDINGS

ORIGINAL CHARGE(S)
ASSAULT IN THE SECOND DEGREE

CHARGE TO WHICH DEFENDANT PLEAD
ASSAULT IN THE SECOND DECREE [sic]

DEFENDANT IS CONVICTED AND FOUND GUILTY OF
ASSAULT IN THE SECOND DEGREE

FINAL JUDGMENT AND SENTENCE OF THE COURT
[ ] FINE $ _____ TO BE PAID TO THE CLERK OF COURT

[ ] RESTITUTION $ _____
[X] INCARCERATION
[X] MITTIMUS TO ISSUE IMMEDIATELY

[ ] MITTIMUS STAYED UNTIL _____

[ ] OTHER:

YEARS MONTHS DAYS

5, with a mandatory minimum of 5 years, to run concurrently with Cr. 84-0553 and consecutively with any other sentence Defendant is presently serving.

[X] The Defendant entered the plea(s) indicated. It is adjudged that the Defendant has been convicted of and is guilty of the offense stated above, committed in the manner and form set forth in the charge.

[ ] The court finds that the Defendant comes within the classification of a young adult defendant under HRS Section 667 and that in lieu of any other sentence of imprisonment authorized by law, defendant should be sentenced to a special indeterminate term of imprisonment. The court is of the opinion that such special term is adequate for defendant's correction and rehabilitation and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT IS AS STATED HEREIN.

DATE SIGNED

APR. 8, 1985

JUDGE

ROBERT G. KLEIN

SIGNATURE

/s/ Robert G. Klein

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES.

DATE

APR. 8, 1985 [SEAL]

CLERK

L. Akamoto

JUDGMENT
GUILTY CONVICTION AND SENTENCE
[ ] Young Adult Defendant
NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE
FIRST CIRCUIT

CASE NUMBER

CR. 84-0553

STATE OF HAWAII VS (DEFENDANT)
DeMONT CONNER

POLICE REPORT NUMBER

H-18179

DEFENDANT'S PLEA

[X] GUILTY [ ] NOT GUILTY [ ] NO CONTEST
[ ] JURY VERDICT [ ] JUDGE FINDINGS

ORIGINAL CHARGE(S)

ATTEMPTED ESCAPE IN THE SECOND DEGREE

CHARGE TO WHICH DEFENDANT PLEAD
ATTEMPTED ESCAPE IN THE SECOND DEGREE

DEFENDANT IS CONVICTED AND FOUND GUILTY OF
ATTEMPTED ESCAPE IN THE SECOND DEGREE

FINAL JUDGMENT AND SENTENCE OF THE COURT
[ ] FINE $ _____ TO BE PAID TO THE CLERK OF COURT
[ ] RESTITUTION $ _____
[X] INCARCERATION
[ ] MITTIMUS TO ISSUE IMMEDIATELY
[ ] MITTIMUS STAYED UNTIL _____
[ ] OTHER:

YEARS MONTHS DAYS

5, to run concurrently with Cr. 84-0491 and consecutively with any other sentence Defendant is presently serving.

[X] The Defendant entered the plea(s) indicated. It is adjudged that the Defendant has been convicted of and is guilty of the offense stated above, committed in the manner and form set forth in the charge.

[ ] The court finds that the Defendant comes within the classification of a young adult defendant under HRS Section 667 and that in lieu of any other sentence of imprisonment authorized by law, defendant should be sentenced to a special indeterminate term of imprisonment. The court is of the opinion that such special term is adequate for defendant's correction and rehabilitation and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT IS AS STATED HEREIN.

DATE SIGNED
APRIL 4, 1985

JUDGE
ROBERT G. KLEIN

SIGNATURE
/s/ Robert G. Klein

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES.

DATE
APRIL 4, 1985

CLERK
L. Akamoto [SEAL]

JUDGMENT
GUILTY CONVICTION AND SENTENCE
[ ] Young Adult Defendant
NOTICE OF ENTRY

STATE OF HAWAII

CIRCUIT COURT OF THE
FIRST CIRCUIT

CASE NUMBER

CR. 85-0110

STATE OF HAWAII VS (DEFENDANT)
DeMONT CONNER

POLICE REPORT NUMBER
D-10954, D-09835, D-11230

DEFENDANT'S PLEA
[X] GUILTY [ ] NOT GUILTY [ ] NO CONTEST
[ ] JURY VERDICT [X] JUDGE FINDINGS

ORIGINAL CHARGE(S)
COUNTS I & VI: BURGLARY 1°
COUNT II: ROBBERY 1°
COUNT IV: ASSAULT 2°
COUNT V: KIDNAPPING

CHARGE TO WHICH DEFENDANT PLEAD

DEFENDANT IS CONVICTED AND FOUND GUILTY OF
COUNTS I & VI: BURGLARY 1°
COUNT II: ROBBERY 1°
COUNT IV: ASSAULT 2°
COUNT V: KIDNAPPING (CLASS B)

FINAL JUDGMENT AND SENTENCE OF THE COURT
[ ] FINE $ _____ TO BE PAID TO THE CLERK OF COURT

[X] RESTITUTION $ amount to be determined by Adult Probation Division & approved by the Court, manner of payment to be determined by Hawaii Paroling Authority.
[X] INCARCERATION
[X] MITTIMUS TO ISSUE IMMEDIATELY
[ ] MITTIMUS STAYED UNTIL _____
[ ] OTHER:

YEARS MONTHS DAYS
20*/life**/10***

*as to each of Counts I, V, VI.
**as to Count II.
***as to Count IV. Terms to be served concurrently with any other term of imprisonment heretofore imposed upon Defendant.

[X] The Defendant entered the plea(s) indicated. It is adjudged that the Defendant has been convicted of and is guilty of the offense stated above, committed in the manner and form set forth in the charge.

[ ] The court finds that the Defendant comes within the classification of a young adult defendant under HRS Section 667 and that in lieu of any other sentence of imprisonment authorized by law, defendant should be sentenced to a special indeterminate term of imprisonment. The court is of the opinion that such special term is adequate for defendant's correction and rehabilitation and will not jeopardize the protection of the public.

THE JUDGMENT AND SENTENCE OF THIS COURT IS AS STATED HEREIN.

DATE SIGNED
6/20/85

JUDGE
DONALD K. TSUKIYAMA

SIGNATURE
/s/ D. Tsukiyama

NOTICE OF ENTRY

THIS JUDGMENT HAS BEEN ENTERED AND COPIES MAILED OR DELIVERED TO ALL PARTIES.

DATE
JUN 24 1985

CLERK
B. NAGATA

I do hereby certify that this is a full, true, and correct copy of the criminal on file in this office.

B. Nagata
Clerk, Circuit Court
FIRST CIRCUIT COURT
STATE OF HAWAII

JUN 24 1985
10:20 o'clock A.M.
B. Nagata
Clerk 11th Division

EXHIBIT "B"
[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
3/14/84	Unauthorized Control of Propelled Vehicle, Count I #57873	4/23/84	5 years CC
3/ 7/84	Kidnapping, Count I #59456	4/23/84	10 years CC
3/ 7/84	Terroristic Threatening First Degree, Count II #59456	4/23/84	5 years CC

You are hereby notified that following a Hearing on September 12, 1984, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Unauthorized Control of Propelled Vehicle, Ct. I, #57873	3 Years
Kidnapping, Ct. I, #59456	8 Years
Terroristic Threatening First Degree, Ct. II, #59456	5 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

_____
Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October ___, 1984, by [ ] Mail [ ] Personal service.

/s/ _____
Secretary
Signature and Title

Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
3/7/84	Robbery First Degree Count III #59456	4/23/84	20 years CC
3/ 8/84	Kidnapping, Count I #59458	4/23/84	20 years CC
6/14/84	Rape First Degree, Count I #59460	7/26/84	Life CC

You are hereby notified that following a Hearing on September 12, 1984, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Robbery First Degree, Ct. III, #59456	8 Years
Kidnapping, Ct. I, #59458	10 Years
Rape First Degree, Ct. I, #59460	20 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

_____
Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October ___, 1984, by [/] Mail [ ] Personal service.

/s/ _____
Secretary
Signature and Title

Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
6/14/84	Sodomy First Degree, Cts, II & III #59460	7/26/84	Life CC
6/14/84	Kidnapping, Count IV #59460	7/26/84	Life CC

You are hereby notified that following a Hearing on September 12, 1984, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Sodomy First Degree, Cts. II & III, #59460	20 Years
Kidnapping, Ct. IV, #59460	20 Years

DATED: Honolulu, Hawaii, State of Hawaii, September 27, 1984

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

_____
Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on October ___, 1984, by [ ] Mail [ ] Personal service.

/s/ _____
Secretary
Signature and Title

Hawaii Paroling Authority
Agency

[SEAL DELETED]

STATE OF HAWAII
HAWAII PAROLING AUTHORITY

NOTICE AND ORDER FIXING MINIMUM TERM(S) OF IMPRISONMENT

In the Matter of DeMONT R.D. CONNER 576-98-9907
A Prisoner

HAVING been duly convicted and sentenced as follows:

First Circuit:

Conviction Date	Offense & Criminal Number	Sentence Date	Maximum Sentence
8/22/84	Attempted Murder, Cts. I & V, #60121	8/22/84	LIFE
8/22/84	Robbery First Degree, Cts. II & VI, #60121	8/22/84	20 Years
8/22/84	Kidnapping, Cts. III & VII, #60121	8/22/84	10 Years
8/22/84	Burglary First Degree, Cts. IV & VIII, #60121	8/22/84	10 Years
8/22/84	Sexual Abuse First Degree, Ct. IX, #60121	8/22/84	5 Years

You are hereby notified that following a Hearing on January 14, 1985, it is the order of the Hawaii Paroling Authority that minimum term(s) of imprisonment is fixed as follows:

Offense & Criminal Number	Minimum Term
Attempted Murder, Cts. I & V, #60121	25 Years
Robbery First Degree, Cts. II & VI, #60121	20 Years
Kidnapping, Cts. III & VII, #60121	10 Years
Burglary First Degree, Cts. IV & VIII, #60121	10 Years
Sexual Abuse First Degree, Ct. IX, #60121	5 Years

DATED: Honolulu, Hawaii, State of Hawaii, February 6, 1985

HAWAII PAROLING AUTHORITY

/s/ _____
Chairman

I do hereby certify that the foregoing is a full, true and correct copy of the original on file.

/s/ _____
Executive Secretary

I certify that a true and correct copy of this document was served to the prisoner on February ___, 1985, by [/] Mail [ ] Personal service.

/s/ _____
Secretary
Signature and Title

Hawaii Paroling Authority
Agency

CONNER, Demont

SENTENCED: 4/23/84

CRIME	MIN	EXPIRES
59456 (Ct 1: Kidnapping)	8 yrs	9/16/93
(Ct. 2: Terr Thrtng 1)	5 yrs	9/16/88
(Ct. 3: Robbery 1)	8 yrs	9/16/2003
59458 (Ct 1: Kidnapping)	10 yrs	9/14/2003
(Ct. 2: Assault 3)	–	–
57873 (Ct. 1: UCPV)	3 yrs	8/24/88
(Ct. 2: DWOL)	–	–
59460 (Ct. 1: Rape 1)	20 yrs	9/15/2003
(Ct. 2 & 3: Sodomy 1)	20 yrs	9/15/2003
(Ct. 4: Kidnapping)	20 yrs	9/15/2003
60121 (Cts. 1 & 5; Attem. Murder)	25 yrs	3/15/2009
(Cts. 2 & 6: Rob. 1)	20 yrs	3/15/2004
(Cts. 3 & 7: Kidnap.)	10 yrs	3/15/94
(Cts. 4 & 8: Burg. 1)	10 yrs	3/15/94
(Ct. 9: Sex. Abuse. 1)	5 yrs	3/15/89
84-0491 (Assault 2°)	5 yrs cs	11/1/2013
84-0553 (Attpd Escape 2°)	5 yrs	11/14/2013
85-0110 (Cts 1 & 6: Burglary 1°)	20 & 20 yrs	2/01/2005
(Ct 2: Robbery 1°)	25 yrs	2/1/2010
(Ct 4: Assault 2°)	10 yrs	2/1/95
(Ct. 5: Kidnapping)	20 yrs	2/1/2005

DISCHARGED:

PAROLED:

CRIME	MAX	EXPIRES
59456 (Ct 1: Kidnapping)	10 yrs	9/16/93
(Ct. 2: Terr Thrtng 1)	5 yrs	9/16/88
(Ct. 3: Robbery 1)	20 yrs	9/16/2003
59458 (Ct 1: Kidnapping)	20 yrs	9/14/2003
(Ct. 2: Assault 3)	1 yr	–
57873 (Ct. 1: UCPV)	5 yrs	8/24/88
(Ct. 2: DWOL)	1 yr	–
59460 (Ct. 1: Rape 1)	Life ea	9/15/2003
(Ct. 2 & 3: Sodomy 1)		9/15/2003
(Ct. 4: Kidnapping)		9/15/2003
60121 (Cts. 1 & 5; Attem. Murder)	Life	3/15/2009
(Cts. 2 & 6: Rob. 1)	20 yrs	3/15/2004
(Cts. 3 & 7: Kidnap.)	10 yrs	3/15/94
(Cts. 4 & 8: Burg. 1)	10 yrs	3/15/94
(Ct. 9: Sex. Abuse. 1)	5 yrs	3/15/89
84-0491 (Assault 2°)	5 yrs cs	11/1/2013
84-0553 (Attpd Escape 2°)	5 yrs cs	11/14/2013
85-0110 (Cts 1 & 6: Burglary 1°)	*20 & *20 yrs	2/01/2005
(Ct 2: Robbery 1°)	*LWP	2/1/2010
(Ct 4: Assault 2°)	*10 yrs cc	2/1/95
(Ct. 5: Kidnapping)	*20 yrs	2/1/2005

*Restitution to be made.

EXHIBIT C

CHRONOLOGICAL ACTION

NAME: CONNER, DeMont Rafael Darwin
aka: Black R NO. 576-98-9907
Dinky
David Lopaka Tavares

Apr. 23, 1984	Committed by First Circuit Court. Already at OCCC/Dorm 6.
July 20, 1984	Moved from Corr. C to Dorm 3.
August 13, 1984	Moved from Dorm 1 to Corr. C.
August 15, 1984	Moved from Corr. C to HU-2nd
September 4, 1984	#1 Destroying, altering, or damaging government property, or the property of another person resuling [sic] in damage less than $50 (1 count) and #6 Attempting or planning to excape [sic] (1 count). Guilty, confined to Holding Unit, first phase, a period of 30 days.
Aug. 31, 1984	Moved from HU to Dorm 3.
Sept. 4, 1984	Moved from Dorm 3 to HU-1st.
Sept. 10, 1984	Security/Custody Classification: S5/MAX.
Nov. 8, 1984	#4 The use of force on or threats to a correctional worker of the workers family #11 Refusing to obey an order. #5 Using abusive or obscene language to a staff

	#12 Harassment of employees. Guilty of all charges, confined to the Holding Unit 1st Phase 60 days for #4, 14 days #11, consecutive. Charges #5 and #12 to be including. 17 dyas [sic] time served. Committee recommends inmate be referred to the Program Committee for reprogramming to Halawa.
Jan. 2, 1985	Moved from HU-1 to HU-2.
Mar. 5, 1985	Your request to receive inmate compensation for the month of Feb. 1985 has been approved.
May 7, 1985	Request to receive Inmate Compensation for the month of Jan. 1985 has been approved.
May 8, 1985	Moved from HU-2nd to HU-3rd.
May 9, 1985	Report of Misconduct: #4 – assaulting any person without a weapon or dangerous instrument, and #15 – lying or providing false information. 44 days holding unit, suspended for 2 months.
June 27, 1985	#3 Assaulting any person. #11 Refusing to obey an order. Guilty. To be confined to the HU/1st, for 60 days, 7 days time served credited, to serve 23 days commencing 7/1/85 to 7/24/85. Remaining 30 days to be suspended for 6/months.
Aug. 19, 1985	Admitted to HHSF – Intake placement status pending assessment.
Aug. 21, 1985	Transferred back to OCCC.

Aug. 13, 1985	#1 Fighting with another person (1 count). Guilty. Time serve credited. Moved from the 3rd. floor UH to 2nd floor HU/1st phase.
Sept. 3, 1985	Transferred from OCCC to HHSF.
Sept. 3, 1985	Admitted to HHSF on intake placement status pending assessment.
Sept. 5, 1985	Placement in Module A.
Oct. 1, 1985	Transferred to Module 5 due to housing shortage.
Oct. 18, 1985	Religious counseling approved on Fridays with Harry Fujihara.
Dec. 5, 1985	APA: Approved for regligious [sic] counseling with Mr. Chee and Mr. Souza every Thursday, excluding holidays, from 9:15 to 10 a.m.
Dec. 13, 1985	Reclassification: S-5/Max.
Mar. 7, 1986	APA – Transferred to Module C.
Mar. 7, 1986	APA – Placement onto Module C Floorboy workline.
Apr. 17, 1986	APA – Transferred from Module C Floorboy to Kitchen workline.
August 1986	Approved for Bible Correspondence Course.
Dec. 13, 1986	Reclassification: Remain at S-5/Max.
Jan. 15, 1987	Misconduct: Inmate's plea of guilty accepted. Disposition: 30 days disciplinary segregation w/15 days credit time – from 1/1/87 to 1/30/87.

Jan. 30, 1987	End of disciplinary segregation. Placed on Phase I.
Feb. 9, 1987	Early review on Phase I. Placed in general population of Module A.
Feb. 20, 1987	Religious counseling approved with Henry Chee.
April 28, 1987	MISCONDUCT REPORT: 17-201-7 #7) Destroying, altering, or damaging government property . . . $500 - $999.99. Findings – NOT GUILTY
Sept. 14, 1987	temporarily housed at HMSF, SH unit
Aug. 28, 1987	Misconduct: 17-201-7 (14) & (16): The use of physical interference or obstacle resulting in the obstruction, hinderance [sic], or impairment of the performance of a correctional function by a public servant.
	Disp – not guilty of 17-201-7(14) & (16) Charges expunged
Aug. 28, 1987	Misconduct: 17-201-9 (5) Using abusive or obscene language to a staff member
	Disp: 4 hours disciplinary segregation concurrent.
Aug. 28, 1987	Misconduct. 17-201-9 (12) Harassment of employees. Disp. 4 hours disciplinary segregation concurrent.
Oct. 15, 1987	NOTICE OF REPORT OF MISCONDUCT: 17-201-8 #11) Refusing to obey . . . 17-201-9 #5) Using obscene language . . . Findings – GUILTY of both Corrective Action D/S 14 days concurrent (10-16-87 to 10-29-87).

Oct. 17, 1987	MISCONDUCT REPORT: 17-201-9 #5) Using abusive or obscene language . . . Findings – GUILTY Corrective Action – No recreation 2 weeks. (10-26 to 11-illegible)
7/20/88	APA 30 day review for Phase I was conducted. Next review is 8/18/88
Nov. 10, 1987	MISCONDUCT: 17-201-7(14) use of physical interference or obstacle resulting in the obstruction, hindurance [sic], or implairment [sic] of the performance of a correctional function by a public servant & 17-201-8(11) refusing to obey an order of any staff member. Not Guilty
Nov. 19, 1987	MISCONDUCT: 17-201-7(14) use of physical interference or obstacle resulting in the obstruction, hindurance [sic], or impairment of the performance of a correctional function by a public servant & 17-201-8(11) refusing to obey an order of any staff member. GUILTY: 30 days for violating 17-201-7(14) and 14 days for violating 17-201-8(11). start Nov. 26, 1987 and end Dec. 26, 1987
Nov. 23, 1987	MISCONDUCT: 17-201-6(4) use of force on or threats to a correctional officer or the worker's family, 17-201-7(14) use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant, 17-201-8(11) refusing to obey an order of any staff member, 17-201-9(5)

	using abusive or obscene language to a staff member. GUILTY on all four counts 60 days for 17-201-6(4), 30 days for 17-201-7(14), 14 days for 17-201-8(11), and 4 hours for 17-201-9(5) – all time runs concurrent. starting Nov. 26,1 [sic] 1987, and ending Jan. 25, 1988.
Dec. 2, 1987	MISCONDUCT: 17-201-6(4) use of force on or threats to a correctional worker or the worker's family; 17-201-8(11) refusing to obey an order of any staff member (red line); 17-201-8(11) refusing to obey an order of any staff member (water faucet). Disp. guilty on two charges and charge 17-201-8(11) inappropriate. 60 days for violating rule 17-201-6(4) and 14 days for 17-201-8(11). All time run concurrent with time received from Nov. 25, 1987 hearing. starts Nov. 26, 1987 end Jan 25, 1988.
Dec. 2, 1987	MISCONDUCT: 17-201-8(11) refusing to obey an order of any staff member DISP. GUILTY 14 days to run concurrent with time received from hearing held on Nov. 25, 1987, which started Nov. 26, 1987 and ends Jan. 25, 1988.
Dec. 14, 1987	MISCONDUCT: 17-201-6(4) use of force on or threats to a correctional worker or worker's family, 17-201-8(11) Refusing to obey an order of any staff member 17-201-9(5) using abusive or obscene language to a staff member. GUILTY – 30 dyas [sic] from Dec. 21, 1987 to Jan. 20, 1988

Jan. 12, 1988	MISCONDUCT: 17-201-7(4) Assault not guilty
March 1, 1988	APA – approved for religious counseling with Henry Chee.
May 7, 1988	MISCONDUCT: 17-201-6(3) assaulting any person, with or without a dangerous instrument, causing bodily injury Disp – Disp – 60 days seg (minus 18 days pre-hearing detention). Time to start May 10 - June 20, 1988
June 20, 1988	APA – Disciplinary segregation ends 6/20/88. Will be placed onto Phase I. Next review is 7/20/88.
July 5, 1988	RECLASSIFICATION REVIEW: Custody remains Max. Next review is 12/23/88.
July 31, 1988	MISCONDUCT: 17-201-6 (4) Guilty of violation. To receive 60 days segregation commencing 8/22/88 ending 10/20/88.
Sept. 12, 1988	MISCONDUCT: 17-201-9(5) using abusive or obscene language to staff members 17-201-9(12) harassment of employees Disp – loss of privileges from 9/26/88 - 10/10/88.
Oct. 13, 1988	MISCONDUCT: 17-201-9(5) using abusive or obscene language to a staff member loss of privileges for 15 days from 10/17/88 - 11/1/88.

Oct. 20, 1988	APA – Disciplinary segregation ended 10/20/88. Will be placed onto Phase I. Next review is tentatively scheduled for 11/19/88.
Nov. 2, 1988	MISCONDUCT: 17-201-8(11) refusing to obey an order of any staff member 17-201-9(5) using abusive or obscene language to a staff member. 17-201-6(4) the use of force on or threats to a correctional worker or the worker's family. Disp – 60 days discip seg from 11/14/88 - 1/12/89.
Jan. 11, 1989	Segregation ends 1/11/89. Next level Phase I from 60 - 120 days. Next review February 11, 1989.
Feb. 10, 1989	30 day review for Phase I was conducted Next review 3/12/89.
Jan. 21, 1989	MISCONDUCT: 17-201-8(11) Refusing to obey an order of any staff member. DISPOSITION: GUILTY, segregation 14 days. Time to start 2/21/89 - 3/6/89.
Feb. 22, 1989	MISCONDUCT: 17-201-8(11) Refusing to obey an order of any staff member. DISPOSITION: NOT GUILTY.
Feb. 7, 1989	RECLASSIFICATION: Custody status, "MAX" score 28 pts. Next review Dec. 23, 1989.
Feb. 27, 1989	MISCONDUCT: 17-201-8911) refusing to obey an order of any staff member Disp – 14 days seg from 3/21/89 - 4/3/89.

Mar. 14, 1989	MISCONDUCT: 17-201-8(11) refusing to obey an order of any staff member Disp – 14 days seg from 4/2/80 - 4/15/89.
Mar. 22, 1989	MISCONDUCT: 17-201-9(5) using abusive or obscene language to staff member 17-201-9(12) harassment of employees Disp extra duty for 14 days from 3/26/89 - 4/8/89.
April 11, 1989	Seg ends 4/15/89. Placed onto Phase I with next review 5/15/89.
Mar. 28, 1989	MISCONDUCT: 17-201-8(10) possession of anything not authorized for retention or receipt by the inmate or ward and not issued to the inmate or ward through regular institutional channels. Disp 14 days from 4/15/89-4/28/89.
April 27, 1989	Seg ends & placed onto Phase I with review on 5/28/89.
May 31, 1989	Placeed [sic] onto Phase I. Next review 6/28
june 26, 1989	transferred to module A
june 9, 1989	approved for counseling with Rev. Rasool
june 7, 1989	MISCONDUCT: 17-201-79(14) use of physical interference or obstacle 17-201-8(11) refusing to obey an order of any staff member – charges dropped because charging officer was not present.
Sept. 13, 1989	transferred to module B

EXHIBIT F

[EXHIBIT "D" OMITTED]

IV

THE CLASSIFICATION PROCESS

1. GENERAL:

An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division.

2. COMPOSITION:

The facility administrator shall establish an impartial Program Committee composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee. The facility administrator shall not sit as a member of the Committee.

3. PROCEDURE:

So long as a transfer involves a grievous loss to the inmate/ward, the following procedures adhere. Grievous loss is generally defined as a serious loss to a reasonable man. Thus, transfer from Hawaii State

Prison to Kulani Honor Camp would normally not cause a grievous loss.

a. Pre-hearing detention. An inmate/ward should not be detained pending hearing longer than four working days, except where emergency conditions require a longer period of detention which shall be a reasonable time.

b. Notice. The inmate/ward has the right to prior notice that a Program Committee hearing will be held involving him.

(1) Within a reasonable time, not less than 24 hours prior to the hearing, the inmate/ward shall be served with written notice of the time and place of the Program Committee hearing and what the Committee will consider at the hearing. The notice should briefly state what the classification process involves, that it considers everything in his file, and any recent specific facts which may weigh significantly in the classification process. If the inmate/ward waives the 24 hour period, it shall be reduced to writing and signed by the inmate/ward on the face of the notice.

(2) The inmate/ward and/or his counsel substitute (as described below) shall have the opportunity to review all relevant nonconfidential information, that may be considered by the Committee, during the period between the notice and the hearing.

c. Hearing. The inmate/ward has a right to appear during the Program Committee hearing if a change, modification, or transfer is planned which would result in a grievous loss. If the

inmate/ward declines to attend the hearing, it shall be held regardless of his absence.

(1) The Committee shall explain the nature of the classification process and generally what the Committee is considering at the hearing.

(2) Evidence shall be presented to the Committee in the presence of the inmate/ward. The inmate/ward should be advised that he has a right to remain silent, but that his silence may be used as a permissible inference of evidence against him.

(3) Confrontation and cross-examination:

(a) The inmate/ward may be given the privilege to confront and cross-examine adverse witnesses.

(b) However, the Committee may deny confrontation and cross-examination and identification of adverse witnesses if in its judgment to do so would:

(i) subject the witness(es) to potential reprisal;

(ii) jeopardize the security and/or good government of the facility; or

(iii) be otherwise unduly hazardous to the facility's safety or correctional goals.

(c) If confrontation and cross-examination and identification of adverse witnesses are denied, the Committee may, but is not required to, enter in the record of the proceeding and make available to the inmate/ward an explanation for the denial. Additionally, the inmate/ward

shall be given an oral or written summary of the testimony against him and provided an opportunity to respond.

(4) Opportunity to be heard: The inmate/ward shall be given an opportunity to respond to any and all evidence and offer evidence on his behalf.

(a) He should be permitted to call witnesses and present evidence on his behalf so long as it will not be unduly hazardous to institutional safety or correctional goals.

(b) The Committee may deny the inmate's/ward's calling of certain witnesses or presentation of certain evidence for reasons such as: irrelevance; lack of necessity; the hazards presented in individual cases; or any other justifiable reason. In this regard, the Committee retains the discretion to keep the hearing within reasonable limits and refuse the presentation of evidence or the calling of witnesses, keeping in mind the right of the inmate/ward to be heard. The Committee is encouraged, but is not required, to state the reason(s) for the refusal.

(5) Counsel substitute: No inmate/ward shall be represented by an attorney at the Program Committee hearing. He will be permitted to employ counsel-substitute which shall constitute a member of the facility staff who did not actively participate in the process by which the individual was brought before the Committee or, in the facility administrator's discretion, a sufficiently competent inmate designated by the facility staff.

d. Findings. The inmate/ward has a right to be apprised of the findings of the Program Committee.

(1) Upon completion of the hearing, the Committee may take the matter under advisement and will render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing. The inmate/ward's silence may be used as a permissible inference of evidence against him, although reprogramming must be based upon more than his mere silence.

(2) The inmate/ward shall be given a brief written summary of the Committee's findings within a reasonable period of time after the hearing, which findings shall be entered in his file. The findings will briefly set forth the evidence relied upon and the reasons for the action taken. The findings may properly exclude certain items of evidence if necessitated by personal or institutional safety and goals; the fact that evidence has been omitted and the reason(s) therefore must be set forth in the findings.

(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for further study and recommendation.

4. REVIEW:

Each inmate/ward has the right to seek administrative review of the decision through the grievance process. Review shall be initiated within fourteen calendar days of receipt of the final decision.

EXHIBIT "K"

(PARTIAL)

STATE OF HAWAII
DEPARTMENT OF CORRECTIONS
CORRECTIONS DIVISION
Halawa Correctional Facility
99-902 Moanalua Highway
AIEA, HAWAII 96701

TELEPHONE
487-7289

WILLIAM OKU
ADMINISTRATOR

May 16, 1988

Mr. DeMont Conner
99-902 Moanalua Highway
Aiea, Hawaii 96701

Dear Mr. Conner:

A review of the Adjustment Committee results of August 31, 1988 has been completed.

Based on this review, it has been determined that the charge of 17-201-7 (14) & (16): The use of physical interference or obstacle resulting in the obstruction, hinderance [sic], or impairment of the performance of a correctional function by a public servant is inappropriate. Accordingly, I am ordering that all references to a finding of guilt in this charge be expunged.

Sincerely,

/s/ Henry Pikini
Henry Pikini
Deputy Administrator

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT WITH CROSS-MOTION FOR SUMMARY JUDGMENT

(Filed JAN. 8, 1990)

COME NOW PLAINTIFF DeMONT R.D. CONNER, AND HEREBY MOVES THIS COURT PURSUANT TO RULES 56(2) AND (E) TO GRANT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT IN HIS FAVOR FOR THOSE ISSUES SOUGHT TO BE RESOLVED VIA THIS MOTION ON THE GROUNDS THAT PLAINTIFF IS ENTITLED TO JUDGMENT IN HIS FAVOR AS A MATTER OF LAW, AND TO DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THERE EXISTS CONSIDERABLE EVIDENCE ON RECORD IN THE ABOVE-ENTITLED ACTION TO DISPUTE DEFENDANTS ASSERTION AND SUPPORTS PLAINTIFF'S CLAIMS.

THIS MOTION IS BASED ON THE ATTACHED MEMORANDUM IN SUPPORT OF MOTION, AFFIDAVIT OF DeMONT R.D. CONNER AND EXHIBITS, AS WELL AS THE FILES AND RECORDS HEREIN.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY,
AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

MEMORANDUM IN SUPPORT

I. Introduction

THE ORIGINAL COMPLAINT WAS FILED HEREIN ON MAY 10, 1988, BY ORDER DATED MAY 26, 1989, PLAINTIFF WAS GIVEN LEAVE TO FILE AN AMENDED COMPLAINT WHICH PLAINTIFF FILED SEPTEMBER 8, 1989. THE DEFENDANTS IN THEIR MOTION FOR SUMMARY JUDGMENT – MEMORANDUM (HEREINAFTER "DEF. MEMO") CLAIMS THAT THE AMENDED COMPLAINT IS AN ENTIRELY NEW SUIT "BECAUSE IT DOES NOT REPLEAD PLAINTIFF'S ORIGINAL CLAIMS AND ADDS DEFENDANTS". IN FACT ON PAGE 10 OF PLAINTIFF'S AMENDED COMPLAINT, AT NO. 43, PLAINTIFF REPLEADS HIS CAUSE-OF-ACTION AGAINST DEFENDANT SANDIN, ONLY PLAINTIFF – AFTER A CLOSER REVIEW OF THE INCIDENT LEADING UP TO DEFENDANT SANDIN'S ACTIONS – HAS ADDED "COMSPIRACY [sic]" TO DEFENDANT SANDINS' ACTIONS ON TOP OF HER ACTS OF DEPRIVING PLAINTIFF OF DUE PROCESS IN THE AUGUST 28, 1987 ADJUSTMENT COMMITTEE HEARING.

THE DEFENDANTS FURTHER ASSERT THAT PLAINTIFF'S AMENDED COMPLAINT "IS FULL OF CONCLUSORY STATEMENTS BUT LITTLE FACT." PLAINTIFF CONTENDS THAT AS A PRO SE PLAINTIFF HE IS ENTITLED TO BE HELD TO "LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED

BY LAWYERS" *HAINES VS. KERNER*, 404 U.S. 519, 92 S.CT. 594 (1972); *ACCORD, HUGHES VS. ROWE*, 449 U.S. 5, 101 S.CT. 173 (1980). NONETHELESS, IF PLAINTIFF HAS FAILED TO ADEQUATELY STATE HIS FACTS, HE DIRECTS ALL PARTIES CONCERNED TO ALL SUBSEQUENT PLEADINGS – LIKE THIS ONE – SUBMITTED BY PLAINTIFF AS HE WILL ATTEMPT TO MAKE HIS FACTS MUCH CLEARER.

THE DEFENDANTS ALSO CONTEND THAT PLAINTIFF'S "PURPORTED GIST OF THE AMENDED COMPLAINT APPEARS TO BE THAT: PLAINTIFF'S PLACEMENT AT AND WITHIN THE HALAWA HIGH SECURITY FACILITY, I.E. PLAINTIFF'S SO-CALLED "BEHAVIOR MODIFICATION PROGRAM", VIOLATES HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS AND THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT". . . . "THE DEFENDANTS CONTENTION IS MISPLACED AND PATENTLY FRIVOLOUS, FOR PLAINTIFF *DOES NOT* CHALLENGE HIS TRANSFER AND PLACEMENT" AT AND WITHIN THE HALAWA HIGH SECURITY FACILITY," AS IT IS OBVIOUSLY APPARENT FROM PLAINTIFF'S INSTITUTIONAL FILE AND FROM HIS CRIMINAL CONVICTIONS THAT THE HIGH SECURITY FACILITY IS A PROPER PLACE FOR INMATES WHO POSE SUCH A THREAT TO THE COMMUNITY AND TO THE PRISON ENVIRONMENT. BUT, DOES THIS GIVE DEFENDANTS THE RIGHT TO DO WITH PLAINTIFF WHATEVER THEIR WHIMS DESIRE? NO! DOES PLAINTIFF FORFEIT HIS RIGHT TO BE FREE FROM THE ARBITRARY ACTIONS OF DEFENDANT PRISON OFFICIALS? CERTAINLY NOT!

THEREBY, PLAINTIFF DOES NOT CHALLENGE BEING PLACED IN THE HIGH SECURITY FACILITY PER SE, INSTEAD PLAINTIFF CHALLENGES *"WHAT THE DEFENDANTS CALL"* THEIR BEHAVIOR MODIFICATION SYSTEM: "SEGREGATION AND MAXIMUM CONTROL PROGRAM", PLAINTIFF IS SAYING THAT:

1. DEFENDANTS' SEGREGATION AND MAXIMUM CONTROL PROGRAM *IS A RULE THAT GOVERNS THE ENTIRE HALAWA HIGH SECURITY FACILITY* AND BECAUSE IT *IS A RULE* OF SUCH, SAID *RULE IS UNCONSTITUTIONAL!*

2. THAT VARIOUS ASPECTS OF DEFENDANTS PHASING SYSTEM RUN AFOUL TO PLAINTIFF'S RIGHTS UNDER THE CONSTITUTION.

THE REMAINING ISSUES THAT DEFENDANTS CITE IN THEIR MEMORANDUM WHICH PLAINTIFF CHALLENGES I.E. STRIP SEARCHES; MECHANICAL RESTRAINTS; UNAUTHORIZED INMATE COMMUNICATION IN FOREIGN LANGUAGE; RETALIATION; EXERCISE; FORM 106; REHABILITATION ARE ABOUT AS CLOSE TO WHAT PLAINTIFF IS CHALLENGING.

DEFENDANTS ALSO RAISE DEFENSES OF THEIR OWN THAT THEY BELIEVE THEY ARE ENTITLED TO:

1. SOVEREIGN IMMUNITY;

2. QUALIFIED IMMUNITY;

II. FACTS

PLAINTIFF DOES NOT DISPUTE DEFENDANTS CONTENTION THAT "PLAINTIFF. . . . PRESENT THE STEREO TYPICAL CRIMINAL" . . . [AND] "IS CONSIDERED A HIGH CUSTODIAL RISK INMATE AND IS INCARCERATED AT HALAWA HIGH SECURITY FACILITY WHICH BY LAW HOUSES THE STATE'S MOST DANGEROUS, PREDATORY AND HIGH RISK INMATES." DEFENDANT'S CONTENTION IN THIS RESPECT CANNOT BE DISPUTED BY PLAINTIFF.

NEVERTHELESS, THE FACT STILL REMAINS THAT:

> "BUT THOUGH HIS RIGHTS MAY BE DIMINISHED BY THE NEEDS AND EXIGENCIES OF THE INSTITUTIONAL ENVIRONMENT, *A PRISONER IS NOT WHOLLY STRIPPED OF CONSTITUTIONAL PROTECTIONS WHEN HE IS IMPRISONED FOR CRIME. THERE IS NO IRON CURTAIN DRAWN BETWEEN THE CONSTITUTION AND THE PRISONS OF THIS COUNTRY."* (EMPHASIS ADDED) *WOLFF VS. MCDONNELL*, 418 U.S. 539, 555-56, 94 S.CT. 2963 (1974) (CITATIONS OMITTED).

III. DEFENDANTS' ARGUEMENT [sic] CONCERNING, "PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHTH AMENDMENT RIGHTS" IS WHOLLY MISPLACED AND PATENTLY FRIVOLOUS

AS STATED EARLIER, THE DEFENDANTS' ARGUEMENT [sic] CONCERNING PLAINTIFF'S PLACEMENT

IS WHOLLY MISPLACED AND IS PATENTLY FRIVOLOUS. THE ISSUE IS NOT PLAINTIFF'S PLACEMENT AT AND WITHIN THE VARIOUS PHASES AT THE HIGH SECURITY FACILITY. THE ISSUE IS WHETHER DEFENDANTS' "SEGREGATION AND MAXIMUM CONTROL PROGRAM" OR "S.M.C.P." VIOLATES PLAINTIFF'S:

1. DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION;

IF IT IS FOUND THAT THE SEGREGATION AND MAXIMUM CONTROL PROGRAM (HEREINAFTER "S.M.C.P.") VIOLATES PLAINTIFF'S STATE-CREATED ENTITLEMENT TO BE FREE FROM RULES NOT MADE IN ACCORDANCE WITH ESTABLISHED RULE-MAKING PROCEDURES, THEN PLAINTIFF REQUESTS THAT THIS COURT DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE AND INSTEAD GRANT PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THIS ISSUE.

A. DUE PROCESS

THE FIRST QUESTION THAT SHOULD BE RESOLVED BEFORE RESOLVING THE QUESTION OF WHAT PROCESS IS DUE TO PLAINTIFF, IS THAT THIS COURT SHOULD LOOK TO SEE IF PLAINTIFF HAVE BEEN DEPRIVED OF A LIBERTY OR PROPERTY INTEREST.

THE UNITED STATES SUPREME COURT HAS HELD THAT "LIBERTY INTERESTS" OR "PROPERTY

INTERESTS" PROTECTED BY DUE PROCESS MAY ARISE IN TWO WAYS: FROM THE CONSTITUTION ITSELF, CF. *PROCUNIER VS. MARTINEZ*, 416 U.S. 396, 417-19, 94 S.CT. 1800 (1974); *ACCORD, VITEK VS. JONES*, 445 U.S. 480, 491-94, 100 S.CT. 1254 (1980), OR FROM STATE OR FEDERAL STATUTES, RULES, OR UNDERSTANDINGS. *CONNECTICUT BOARD OF PARDONS VS. DUMSCHAT*, 452 U.S. 458, 465, 101 S.CT. 2460 (1981).

IN THE CASE-AT-BAR, PLAINTIFF ALLEGES THAT STATE LAW, STATUTES, RULES AND REGULATIONS TOGETHER GIVES PLAINTIFF A "STATE-CREATED LIBERTY INTEREST" (OR "ENTITLEMENT") TO NOT BE SUBJECTED TO RULES THAT HAVE NOT BEEN MADE IN ACCORDANCE WITH RELEVANT RULE MAKING PROCEDURES. "[R]ULES WHICH ARE NOT APPROVED BY THE GOVERNOR AND FILED WITH THE LIEUTENANT GOVERNOR AS REQUIRED BY H.A.P.A. (HAWAII ADMINISTRATIVE PROCEDURE ACT) §§ 91-3(B) AND 91-4(B)(2), BY THE FACT OF THAT FAILURE ALONE HAVE NO "FORCE OR EFFECT" *AGUIAR VS. H.H.A.*, 55 HAW. 478, 522 P.2D 1255 (1974) (*CITING OTANI VS. CONTRACTORS LICENSE BOARD*, 51 HAW. 673, 676, 466 P.2D 1009, 1011 (1970); *SEE ALSO STATE VS. LEE*, 51 HAW. 516, 522, 465, P.2D 573, 577 (1970).

HERE, THE "*RULES*" THAT PLAINTIFF ALLEGES IS IN VIOLATION OF HIS STATE-CREATED LIBERTY INTEREST, IS DEFENDANTS' FALK, SAKAI, OKU AND SHOHET'S "SEGREGATION AND MAXIMUM CONTROL PROGRAM." DEFENDANTS DO NOT DISPUTE PLAINTIFF'S CONTENTION THAT THERE "SEGREGATION AND MAXIMUM CONTROL PROGRAM"

(HEREIN AFTER "S.M.C.P.") *IS A "RULE" THAT GOVERNS THE ENTIRE HALAWA HIGH SECURITY FACILITY'S INMATES*. INDEED, FOR DEFENDANTS TO DISPUTE THAT THEIR S.M.C.P IS NOT A "*RULE*" THAT "*GOVERNS*" *THE* HIGH SECURITY "*FACILITY*" WOULD BE FRIVOLOUS AS *H.A.P.A. ID.* STATES IN PERTINENT PART:

> " 'RULES' MEANS EACH AGENCY STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE EFFECT THAT IMPLEMENT, INTERPRETS OR PRESCRIBES LAW OR POLICY, OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENT OF ANY AGENCY . . . " HAWAII REVISED STATUTES § 91-1(4). (HAW.REV.STAT.")

COMPARE EXHIBIT "A" (WHICH IS A TRUE AND CORRECT COPY OF THE POLICY AND PROCEDURES FOR DEFENDANTS' S.M.P.C.) WITH EXHIBIT "B" AT PAGE 2-5 LAST PARAGRAPH. (EXHIBIT ATTACHED HERETO). BASED ON THE UNDISPUTED FACT THAT THE S.M.C.P. IS A "RULE" GOVERNING THE ENTIRE H.H.S. FACILITY, IT IS CLEAR THAT STATE LAW REQUIRES DEFENDANTS TO VALIDATE THEIR RULES IN ACCORDANCE WITH RULE-MAKING PROCEDURES, *SEE* HAW. REV.STAT. § 91-3(C) WHICH STATES IN PERTINENT PART:

> "THE ADOPTION, AMENDMENT, OR REPEAL OF ANY RULE BY ANY STATE AGENCY SHALL BE SUBJECT TO THE APPROVAL OF THE GOVERNOR . . . "

COMPARE WITH THE SIMILAR LANGUAGE OF HAW.REV.STAT. § 353-3 *AND* TITLE 17 ADMINISTRATIVE RULES OF CORRETIONS [sic] DIVISION § 17-200-1(A) ATTACHED HERETO AS EXHIBITS "C" AND "D" RESPECTIVELY. *SEE ALSO WILDER VS. TANOUYE*, 753 P.2D 816 WHERE THE INTERMEDIATE COURT OF APPEALS FOR THE STATE OF HAWAII HELD THAT "RULES" WITHIN THE MEANING OF RELEVANT STATUTES APPLY [IN THE CONTEXT OF INSTITUTIONS] TO RULES GOVERNING A FACILITY AND NOT TO RULES THAT GOVERN ONLY A PARTICULAR HOUSING UNIT OF A FACILITY. IT SHOULD BE STATED HERE THAT THE S.M.C.P. HAS FOUR LEVELS OF SEQUENTIAL GRADIENTS OF PROGRAMMING I.E. "PHASE ONE", MODULE "A", "B", AND "C"; PLAINTIFF *DOES NOT* AT THIS POINT CHALLENGE THE GUIDELINES SET FORTH FOR EACH LEVEL, INSTEAD PLAINTIFF CHALLEGES [sic] THE HEAD OF THE LEVEL PROGRAM WHICH DICTATES HOW EACH LEVEL SHALL BE CONTROLED [sic] ETC. NAMELY THE S.M.C.P.

IT IS ALSO UNDISPUTED BY DEFENDANTS THAT THEY DID NOT SEEK, NOR DID THEY OBTAIN THE APPROVAL OF THE GOVERNOR WHEN THEY SOUGHT TO APPLY THEIR S.M.C.P. AS A FACILITY RULE (*SEE ALSO* EXHIBIT "E" ATTACHED HERETO, WHICH SUPPORTS THE FACT THAT APPROVAL FOR DEFENDANTS' S.M.C.P. WENT ONLY AS HIGH AS HAVING THE DIRECTOR OF CORRECTIONS' ASSISTANT IDENTIFIED AS MS. EDITH WILHELM TO SIGN FOR THE DIRECTOR OF CORRECTIONS – MR. KAKESAKO, AT PAGE 3 NO. 8) IT IS OBVIOUS THAT

THE DEFENDANTS ARE IN CLEAR VIOLATION OF STATE LAW, STATUTES, RULES, REGULATIONS, AND POLICY AND PROCEDURES.

THUS, THE QUESTION PLAINTIFF PRESENTS IS WHETHER THE AFOREMENTIONED STATE REGULATIONS ETC. GIVE PLAINTIFF A STATE-CREATED LIBERTY INTEREST TO NOT BE SUBJECTED TO RULES WHICH HAVE NO FORCE OR EFFECT OF LAW? PLAINTIFF CONTENDS THAT IT DOES.

IT IS CLEAR THAT NOT EVERY STATE STATUTE OR REGULATION CREATES A LIBERTY INTEREST. ONLY IF A STATUTE OR REGULATION LIMITS THE DISCRETION OF STATE OFFICIALS BY PROVIDING THAT THEY "MAY" OR "MUST" TAKE SOME ACTION ONLY UNDER CERTAIN PRESCRIBED CIRCUMSTANCES DOES THE STATUTE OR REGULATION CREATE A LIBERTY INTEREST OR "ENTITLEMENT". *HEWITT VS. HELMS*, 459 U.S. 460, 466, 103 S.CT. 864, 871 (1983) ("THE REPEATED USE OF EXPLICITLY MANDATORY LANGUAGE IN CONNECTION WITH REQUIRING SPECIFIC SUBSTANTIVE PREDICATES DEMANDS A CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST"); *TOUSSAINT VS. MCCARTHY*, 801 F.2D 1080, 1089 (9TH CIR.1986), *CERT. DENIED*, 107 S.CT. 2462 (1987).

HERE, IT IS INDISPUTABLE THAT, EITHER ALONE OR COMBINED, THE RULE-MAKING PROCEDURES OF THE HAWAII ADMINISTRATIVE PROCEDURE ACT ("H.A.P.A.") § 91-3(C) WHICH IS CROSSED REFERENCED BY HAWAII REVISED STATUTES § 353-3 (*SEE* EXHIBIT "C" ATTACHED) AND § 17-200-1(A) OF TITLE

17 ADMINISTRATIVE RULES OF CORRECTIONS DIVISION (*SEE* EXHIBIT "D" ATTACHED)" CONTAIN EXPLICIT *MANDATORY* LANGUAGE IN CONNECTION WITH REQUIRING THE APPROVAL OF THE GOVERNOR [A SPECIFIC SUBSTANTIVE PREDICATE], THUS, A DEMANDING CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST". *HEWITT*, SUPRA.

THEREFORE, AS IT IS ALSO REQUIRED BY STATE LAW THAT STATES:

> *". . . . THE COURT SHALL DECLARE THE RULE INVALID IF IT FINDS IT VIOLATES THE CONSTITUTIONAL OR STATUTORY PROVISIONS OR EXCEEDS THE STATUTORY AUTHORITY AND WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULE-MAKING PROCEDURE."* HAW.REV.STAT. § 91-7(B) (EMPHASIS ADDED)

THIS COURT IS BOUND BY THE STATE LEGISLATURES DICTATION OF RULE-MAKING PROCEDURES AND THE JUDGMENTS OF THE HAWAII STATE SUPREME COURT PURSUANT TO 28 U.S.C.A. § 1738. *PIATT VS. MACDOUGALL*, 773 F.2D 1032 (9TH CIR. 1985).

FURTHERMORE, DEFENDANTS ARE NOT ENTITLED TO "DEFERENCE" STANDARD THAT HAS BEEN LONG ACCORDED TO PRISON AUTHORITIES, SEE *TURNER VS. SAFLEY*, 107 S.CT. 2254, AT 2259, AS THERE COULD NOT BE ANY "REASONABLENESS" TO A RULE IMPLEMENTED IN VIOLATION OF CLEARLY ESTABLISHED CASE LAW. ON THE OTHER HAND, HAD DEFENDANTS FOLLOWED RULE-MAKING PROCEDURES WHEN THEY SOUGHT TO SUBJECT

INMATES TO THEIR S.M.C.P., THEN PLAINTIFF WOULD MOST LIKELY NOT SUCCEED ON CHALLENGING THE "EXISTANCE" OF THIS RULE. HOWEVER, THIS IS NOT THE CASE HERE, THE S.M.C.P. AS A "RULE" ACCORDING TO ESTABLISHED RULE-MAKING PROCEDURES IS ILLEGAL AND HAVE "NO FORCE OR EFFECT" OF LAW. THEREFORE, PLAINTIFF HAS AN INHERENT RIGHT, UNDER THE RULE-MAKING PROCEDURES, TO NOT BE SUBJECTED TO ILLEGAL RULES. THEREFORE, BECAUSE OF DEFENDANTS CONTINUED ENFORCEMENTS OF THEIR ILLEGAL S.M.C.P. "RULE" WHICH INFRINGES ON PLAINTIFF'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION OF THE LAW, PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT IN HIS FAVOR FOR THIS ISSUE SHOULD BE GRANTED AND DEFENDANTS MOTION FOR A SUMMARY JUDGMENT IN THEIR FAVOR SHOULD BE DENIED.

B. <u>DUE PROCESS AS APPLIED TO PARTICULAR POLICIES AND PRACTICES OF DEFENDANTS FALK, SAKAI, OKU AND SHOHET'S PHASING PROGRAM</u>

PLAINTIFF AGREES WITH THE COURT IN *SIMS*, (EXHIBIT "B") THAT "CERTAIN PARTICULAR POLICIES AND PRACTICES APPEAR TO RUN AFOUL OF THE CONSTITUTION". SEE <u>3</u>RD PARAGRAPH ON PAGE <u>19</u> OF EXHIBIT "B". PLAINTIFF SEEKS TO HAVE THIS COURT TO GRANT HIM SUMMARY JUDGMENT ON THESE ISSUES.

TO THE EXTENT THAT DEFENDANTS CONTEND THAT PLAINTIFF'S PLACEMENT WITHIN THE VARIOUS PHASES AT THE HIGH SECURITY FACILITY IS WITHOUT MERIT SINCE HIS PLACEMENT DID NOT AFFECT A LIBERTY INTEREST SUBJECT TO AUDIT UNDER THE DUE PROCESS CLAUSE. DEFENDANTS POSITION IS SIMPLY ERRONEOUS.

WHILE PHASING PROGRAMS *PER SE* MAY NOT BE UNCONSTITUTIONAL. PLAINTIFF CONTENDS THAT – AT LEASE [sic] IN THIS ARGUEMENT [sic] -PARTICULAR POLICIES AND PRACTICES OF THE PHASING PROGRAM ARBITRARILY INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHTS.

THE FIRST ASPECT THAT DEFENDANTS INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHTS IS BY DENYING PLAINTIFF PERIODIC REVIEWS OF HIS CONFINEMENT.

IT IS UNDISPUTED BY DEFENDANTS THAT THEY DO NOT PROVIDE PLAINTIFF WITH PERIODIC REVIEWS OF HIS CONFINEMENT IN MODULES "A", "B" OR "C", NOR DO THEY DISPUTE THAT THEY DO NOT ALLOW PLAINTIFF TO HAVE ANY MEANINGFUL PARTICIPATION IN THEIR 30 REVIEWS CONDUCTED WHILE PLAINTIFF IS IN PHASE ONE I.E. PHYSICAL OR WRITTEN. *SEE ALSO* PARAGRAPH 3 ON PAGE 8 OF EXHIBIT "B". THESE DEPRIVATIONS ADDED TO THE FACT THAT "DEFENDANTS USE PHASING TO PUNISH INMATES. TITLE 17'S REGULATIONS CREATED A LIBERTY INTEREST IN BEING FREE FROM PUNISHMENT. THEREFORE, [PLAINTIFF] HAVE A LIBERTY INTEREST IN NOT BEING CONFINED

UNDER THE PHASING PROGRAM". PARAGRAPH 3 PAGE 26 EXHIBIT "B". *SEE* §§ 17-201-6 THROUGH 17-201-20 EXHIBIT "F". COMPARE PARAGRAPH 3 ON PAGE 23 EXHIBIT "B".

AS THE REVIEWING COURT IN *SIMS*, EXHIBIT "B", STATED: "THE TOUCHSTONE OF DUE PROCESS IS PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY ACTION OF GOVERNMENT". *WOLFF VS. MCDONNELL*, 418 U.S. 539, 558 (1974) PARAGRAPH 4 ON PAGE 26 EXHIBIT "B". PLAINTIFF TAKES THE SAME POSITION AS THE REVIEWING COURT IN *SIMS* IN APPLYING THE *PROCEDURAL REQUIREMENTS* ENUMERATED ON PAGES 27-32 OF EXHIBIT "B" *WITH* RELEVANT CASE LAW TO SUPPORT HIS REQUEST THAT THIS COURT GRANT PLAINTIFF SUMMARY JUDGMENT ON THIS ISSUE IN HIS FAVOR AS THERE IS NO DIFFERENCE FROM THE ISSUES IN THIS ARGUEMENT [sic] AND THE FACTS THAT WAS FOUND IN THE *SIMS* CASE. ALSO, THIS COURT SHOULD *DENY* DEFENDANTS REQUEST FOR SUMMARY JUDGMENT IN THEIR FAVOR ON THIS ISSUE.

OTHER POSITIONS THAT PLAINTIFF TAKES THAT ARE THE SAME AS THE ISSUES, FACTS, AND RELEVANT CASE LAW AS SET FORTH IN *SIMS*, EXHIBIT "B" ARE:

1. EXERCISE;
2. RELIGIOUS
   (I) RELIGIOUS COUNSELING AND
   (II) RELIGIOUS LITERATURE;

3. INCOMING MAIL; AND

4. WRITTEN RULES;

THE DEFENDANTS DISPUTES THAT THEIR DECISION TO LIMIT OUTDOOR EXERCISE TO FIVE HOURS PER WEEK IS BASED ON SOUND ADMINISTRATIVE CONSIDERATIONS, AS WELL AS VALID PENOLOGICAL OBJECTIVES. YET, THE ONLY "OBJECTIVES" AND "CONSIDERATIONS" THEY OFFER ARE THAT WHILE IN PUNITIVE ISOLATION AN INMATE IS IN THE RECREATION YARD ALONE AND THAT THIS FACT PRESENTS "OBVIOUS SECURITY REASONS", AND THAT IT WOULD BE DIFFICULT TO PERMIT EACH INMATE MORE THAN ONE HOUR OF RECREATION PER DAY WITHOUT STRAINING LIMITED SECURITY RESOURCES. THESE REASONS FOR DENYING PLAINTIFF ADEQUATE EXERCISE AND RECREATION – AND ULTIMATELY SUBJECTING PLAINTIFF TO CRUEL AND UNUSUAL PUNISHMENT – CANNOT POSSIBLY BE A "REASONABLE" JUSTIFICATION FOR DEPRIVING PLAINTIFF OF ADEQUATE EXERCISE AND RECREATION UNDER THE *TURNER VS. SAFLEY* STANDARD 107 S.CT. 2254 (1987). THEREFORE, THIS COURT SHOULD GRANT PLAINTIFF SUMMARY JUDGEMENT IN HIS FAVOR FOR THIS ISSUE AND DENY DEFENDANTS' REQUEST FOR SUMMARY JUDGMENT IN THEIR FAVOR FOR THIS ISSUE.

AS TO THOSE OTHER ISSUES THAT THE *SIMS* REVIEWING COURT DEALT WITH AND FOUND AS FACT *AND* CONCLUDED THAT *SIMS*, WAS ENTITLED TO PRELIMINARY INJUNCTIVE RELIEF I.E. RELIGIOUS; INCOMING MAIL AND WRITTEN RULES,

DEFENDANTS HAVE NOT BROUGHT FORTH ANY ARGUEMENT [sic] OR CASE LAW DISPUTING THESE VERY ISSUES THAT PLAINTIFF ALSO PRESENTS IN HIS AMENDED COMPLAINT AND WHICH IS UNDOUBTEDLY A FACT AS AN EXTENSIVE HEARING AND TESTIMONY AND DIRECT EVIDENCE WAS HELD IN THE *SIMS* CASE AND THE COURT ACCEPTED THEM AS FACT, THEREFORE, BEING THAT PLAINTIFF ALLEGES THE SAME THING AS *SIMS* – INSOFAR AS THESE CLAIMS GO – THIS COURT SHOULD ALSO ACCEPT THEM AS FACT.

SHOULD THIS COURT ACCEPT THESE AFOREMENTIONED ISSUES AS FACT, PLAINTIFF, RELYING ON THE SAME CASE LAW THAT THE COURT IN *SIMS* FOUND TO BE RELEVANT FOR THESE ISSUES, REQUEST THAT THIS COURT GRANT PLAINTIFF SUMMARY JUDGMENT IN HIS FAVOR AND DENY DEFENDANTS SUMMARY JUDGMENT IN THEIR FAVOR ON THESE ISSUES.

ANOTHER DUE PROCESS VIOLATION THAT DEFENDANTS SUBJECT PLAINTIFF TO IS THE TOTALLY ARBITRARY USE OF 106 MINOR MISCONDUCTS. DEFENDANTS CLAIM THAT PLAINTIFF IS NOT ENTITLED TO DUE PROCESS UNTIL HE HAS ACCUMULATED A "COLLECTION OF UNFAVORABLE 106'S". THE DEFENDANTS' POSITION IS FRIVOLOUS.

ON ONE HAND DEFENDANTS CLAIM THAT INMATES WILL ADVANCE TO THE NEXT LEVEL IN THEIR PHASING PROGRAM IF THEY (1) ADHERE TO THE RULES OF THE FACILITY, HOUSING UNIT AND THE CORRECTIONS DIVISION. (2) DO NOT INCUR

NEW MISCONDUCT VIOLATIONS, AND (3) DEMONSTRATE SUCCESSFUL ADJUSTMENT OF BEHAVIOR AND ATTITUDE, *SEE* PARAGRAPH 3 PAGE 7 OF EXHIBIT "B" COMPARE EXHIBIT "E" NO. 4 PAGE 2; YET DEFENDANTS ADMIT THAT NOT UNTIL PLAINTIFF RECEIVES A COLLECTION OF MINOR 106 MISCONDUCTS WILL HE, THEN, BE GIVEN DUE PROCESS.

THUS, IN SUMMARY, AS LONG AS PLAINTIFF DOES NOT ACCUMULATE AN "UNFAVORABLE" KIND OF 106 MINOR MISCONDUCTS HE IS NOT ENTITLED TO DUE PROCESS SAFEGUARDS, BUT HE IS ENTITLED TO LONGER PUNISHMENT IN DEFENDANTS PHASING PROGRAM BECAUSE HE HAS NOT ADHERED TO THE RULES OF THE FACILITY BY PICKING UP 106 MINOR MISCONDUCTS THAT ARE LESS THEN [sic] A "COLLECTION" AND NOT IN THE UNFAVORABLE KIND" OF BRACKET. THIS IS SHEER MADNESS.

AS FOUND BY THE REVIEWING COURT IN *SIMS*, EXHIBIT "B", TITLE 17 §§ 17-201-6 THROUGH 17-201-20 CREATE A LIBERTY INTEREST ENTITLEMENT TO NOT BE SUBJECTED TO PUNISHMENT UNLESS FIRST GIVEN SOME FORM OF DUE PROCESS I.E. SEE, EXHIBIT "F" AT § 17-201-11(A) WHERE THE REGULATIONS CLEARLY SPELL OUT WHAT PROCEDURES "SHALL" BE TAKEN IN THE EVENT THAT AN INMATE IS ACCUSED OF COMMITTING A MINOR INFRACTION. THUS, AS PLAINTIFF WILL BE SUBJECTED TO LONGER PUNISHMENT IN DEFENDANTS PHASING PROGRAM PLAINTIFF IS DEFINITELY ENTITLED TO THE MINIMUM DUE PROCESS SAFEGUARDS

PROVIDED FOR IN § 17-201-11(A) WHEN HE FIRST IS ACCUSED OF A MINOR MISCONDUCT. NOWHERE IN ALL OF TITLE 17 DOES IT HINT TO DEFENDANTS BEING ABLE TO POSTPONE GIVING PLAINTIFF DUE PROCESS SAFEGUARDS AFTER HE HAS ACCUMULATED A "COLLECTION" OF "UNFAVORABLE" 106'S WHICH COULD TAKE WEEKS, MONTHS, OR YEARS. DEFENDANTS CANNOT ESCAPE THE ARBITRARINESS OF THEIR CONDUCT IN DEPRIVING PLAINTIFF OF PROCEDURAL DUE PROCESS WHEN PUNISHING HIM FROM ACCUMULATING MINOR MISCONDUCTS, JUSTICE DEMANDS SWIFT ATTENTION.

DEFENDANTS DO NOT DENY THAT THEY *DON'T* GIVE PLAINTIFF DUE PROCESS WHEN THEY SEEK TO PUNISH HIM – NOT THROUGH DISCIPLINARY SEGREGATION, BUT, THROUGH LONGER CONFINEMENT IN THEIR PHASING PROGRAM PER SE – FOR NOT ADHERING TO RULES OF THE FACILITY I.E. COMMUNICATING IN A FOREIGN LANGUAGE SEE EXHIBIT "G" AT NO. 46 ON PAGE 5 INSTEAD DEFENDANTS' JUSTIFY THEIR CONDUCT IN A MOST LUDICROUS FASHION. THUS, AS ALL RELEVANT CASE LAW EASILY FLOWS WITH PLAINTIFF'S ARGUEMENT [sic] IN THIS ISSUE, *HEWITT VS. HELMS*, 459 U.S. 460, 466 (1983), *TOUSSAINT VS. MCCARTHY*, 801 F.2D 1080-1089 (9TH CIR.1986), BUT *SEE WOLF VS. MCDONNELL*, 448 U.S. 539, 558 (1974), PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THIS ISSUE AS A MATTER OF LAW. THEREFORE, THIS COURT SHOULD DENY DEFENDANTS REQUEST FOR SUMMARY JUDGEMENT ON THIS ISSUE.

MECHANICAL RESTRAINTS AND STRIP SEARCHES.

BASED UPON THE OVERWHELMING EVIDENCE OF PLAINTIFFS ANTI-SOCIAL BEHAVIOR BOTH IN SOCIETY AND WHILE INCARCERATED PLAINTIFF IS FORCED TO CONCEDE THIS ISSUE TO DEFENDANTS IN SPITE OF HIS PROFOUND BELEIF [sic] THAT IF YOU TREAT INMATES LIKE ANIMALS, THEY ARE GOING TO CONTINUE TO ACT LIKE ANIMALS.

ARBITRARY INFRINGEMENT ON PLAINTIFFS RIGHT TO FREEDOM OF COMMUNICATIONS RELIGION AND EXPRESSION

DEFENDANTS CONTEND THAT THEY LEGITIMATE REASONS FOR INFRINGING UPON PLAINTIFFS FIRST AMENDMENT RIGHT OF COMMUNICATION PLAINTIFF CONTENDS THAT DEFENDANTS ARE OVER-REACHING.

WHILE DEFENDANTS MAY HAVE A LEGITIMATE ARGUMENT IN PROHIBITING PLAINTIFF FROM COMMUNICATING VIA TELEPHONE AND MAIL OR EVEN TO PRISON PERSONAL [sic] IN A FOREIN [sic] TONGUE. BUT WHEN IT COMES TO WHAT PLAINTIFF CHOSES [sic] TO SAY FROM HIS MOUTH, DEFENDANTS DO NOT HAVE THE AUTHORITY TO INFRIEGN [sic] UPON MY RIGHT TO SAY WHAT PLAINTIFF WANTS ESPECIALLY IN THE INSTANCES THAT WE HAVE HERE.

HERE, PLAINTIFF WHO IS A MUSLIM, WAS LEARING [sic] HOW TO SAY HIS PRAYERS IN ARABIC. DEFENDANTS LEE AND PAAGA ORDERED PLAINTIFF AND ANOTHER INMATE TO STOP AND BOTH

PLAINTIFF AND THE OTHER INMATE REFUSED. THUS, PLAINTIFF WAS PUNISHED FOR REFUSING TO OBEY AN ORDER, LIKE WHAT IS THIS COUNTRY COMING TO? DEFENDANTS LEE AND PAAGA DIRECTLY AND DEFENDANT OKU – THE PROMULGATOR OF THIS ABSURD RULE – ARE IN CLEAR VIOLATION OF PLAINTIFF'S FIRST AMENDMENT RIGHTS.

ALTHOUGH PLAINTIFF HAS NOT BEEN ABLE TO FIND CASE LAW THAT DEALS DIRECTLY WITH THE ISSUE AT HAND, IT IS COMMON SENSE TO KNOW THAT – AT LEAS [sic] IN THIS COUNTRY – YOU DO NOT PUNISH *ANYBODY* FOR PRAYING IN A FORIEGN [sic] LANGUAGE – PERIOD! TIENNAMIN SQUARE IS IN CHINA, THIS IS AMERICA, AND PLAINTIFF JUST SIMPLY REFUSES TO BE INSULTED BY THIS OBVIOUS ARBITRARY ABUSE OF AUTHORITY. "REASONABLE"? DEFENDANTS "ENGLISH SPEAKING ONLY RULE IS DEFINITELY UNREASONABLE UNDER THE *TURNER VS. SAFLEY*, SUPRA, TEST AND PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

RETALIATION

DEFENDANTS CLAIM THAT PLAINTIFF'S RETALIATION CLAIM IS VAGUE. WHEREAS, PLAINTIFF CONTENDS THAT HIS RETALIATION CLAIM ARE VALID AND NOT VAGUE, AND AT THE SAME TIME PLAINTIFF FURTHER CONTENDS THAT HE IS AWAITING DISCOVERY WHICH WILL ASSIST HIM IN PROVING HIS CASE AND THAT THIS MATTER NEEDS TO

BE RESOLVED IN TRIAL AS IT IS UNFAIR FOR PLAINTIFF TO HAVE TO FIGHT THIS ISSUE ON SUMMARY JUDGMENT AND IS NOT BELIEVED TO BE A PROPER VEHICLE FOR SUMMARY JUDGEMENT.

REHABILITATION

PLAINTIFF CONCEDES THAT HE HAS NO RIGHT TO REHABILITATION.

SOVEREIGN IMMUNITY

DEFENDANTS CONTEND THAT THE [sic] ARE PROTECTED BY SOVEREIGN IMMUNITY. DEFENDANTS ARE MISTAKEN.

DEFENDANTS ARE SUED, IN PART, IN THEIR INDIVIDUAL CAPACITIES INSOFAR AS PLAINTIFF SEEKS INJUNCTIVE RELIEF AND DAMAGES. THUS, IN A CASE SUCH AS THIS THE ELEVENTH AMENDMENT DOES *NOT* BAR EITHER INJUNCTIVE OR DAMAGE SUITS AGAINST INDIVIDUAL OFFICIALS OR PRISON EMPLOYEES. *SEE SPICER VS. HILTON*, 618 F.2D 232, 237 (3RD CIR.1980).

FURTHERMORE, PLAINTIFF ALLEGES THAT DEFENDANTS ALSO ACTED IN CONTRARY TO POLICY AND RELEVANT LAW.

QUALIFIED IMMUNITY

DEFENDANTS CONTEND THAT THEY ARE PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY. PLAINTIFF CONTENDS THAT THEY ARE NOT.

UNDER THE DOCTRINE OF QUALIFIED IMMUNITY, OFFICIALS ARE LIABLE ONLY IF THEY "KNEW OR SHOULD HAVE KNOWN" THAT THEY WERE VIOLATING PLAINTIFFS CLEARLY ESTABLISHED CONSTITUTIONAL OR STATUTORY RIGHTS OF WHICH A REASONABLE PERSON WOULD HAVE KNOWN AT THE TIME THE ACTS WERE COMMITTED. *HARLOW VS. FITZGERALD*, ___ U.S. ___, 102S.C. 2727, AT 2738. PERSONS OCCUPYING "RESPECTABLE PUBLIC OFFICE" (I.E. DEFENDANT FALK) ARE EXPECTED TO HAVE KNOWLEDGE OF THE BASIC, UNQUESTIONED CONSTITUTIONAL RIGHTS OF [THEIR] CHARGES". *WOOD VS. STRICKLAND*, 420 U.S. 308, 321-22, 95 S.CT. 992 (1975) *COMPARE*, EXHIBIT "C" 3353-4 & 3353-6 THEREFORE, AS WERE PREVIOUSLY MADE CLEAR, EACH DEFENDANTS PARTICIPATION WHETHER DIRECTLY OR INDIRECTLY, WHERE [sic] IN CLEAR VIOLATION EITHER SEPARATELY OR IN CONJUNCTION TO OTHER STATE LAWS, RULES, REGULATIONS, STATUTES OR POLICY AND PROCEDURES. THUS, DEFENDANTS ARE NOT SHIELDED FROM LIABILITY UNDER THE DOCTRINE OF QUALIFIED IMMUNITY AND PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUES OF IMMUNITIES AS MATTER OF LAW.

CONSTITUTIONAL VIOLATIONS BY EACH DEFENDANT.

DEFENDANTS CLAIM THAT PLAINTIFF IS HARASSING THEM VIA THIS LAW SUIT. THIS IS FRIVOLOUS AS PLAINTIFF PRESENTS A HOST OF SERIOUS CLAIMS THAT HAVE TOTAL MERIT. DEFENDANTS

ALSO CONTEND THAT PLAINTIFF IS MISLEADING THIS COURT BY VAGUE CLAIMS. CONTRARY TO THEIR BELIEF, THOUGH IN HIS UNSKILLED AND UNLEARNED ATTEMPT TO FIGHT FOR HIS RIGHTS, PLAINTIFF MAY FROM TIME TO TIME BE VAGUE. THIS IS NOT DONE TO MISLEAD THIS COURT OR FOR ANY OTHER BAD FAITH MOTIVE. PLAINTIFF IS SIMPLY A LAYMAN WITH A 9.9 GRADE AVERAGE AND SHOULD NOT BE PERSECUTED FOR BEING SUCH.

IN ANY CASE PLAINTIFF IN HIS COMPLAINT WENT THROUGH GREAT PAINS TO NAME EACH DEFENDANT ACCORDING TO EACH ACT OR OMISSION THAT THE [sic] ARE LIABLE FOR. THEREFORE, THIS SUIT SHOULD NOT BE DISMISSED ON THIS GROUNDS.

CONCLUSION

WHEREFOR [sic], AS DEMONSTRATED BY PLAINTIFF, HE IS ENTITLED TO HAVE THIS COURT GRANT HIS MOTION FOR CROSS-SUMMARY JUDGMENT IN HIS FAVOR AS A MATTER OF LAW – FOR THE ISSUES AND THAT ALL OTHER ISSUES IN HIS AMENDED COMPLAINT TO PROCEED TO TRIAL. THIS COURT SHOULD ALSO DENY DEFENDANTS MOTION FOR SUMMARY JUDGMENT ON THOSE ISSUES NOT CONCEEDED [sic] BY PLAINTIFF.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Conner,
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

AFFIDAVIT OF DeMONT R.D. CONNER

CITY AND COUNTY OF)
HONOLULU) SS.
)
STATE OF HAWAII

I, DeMONT R.D. CONNER, BEING DULY SWORN DEPOSES AND SAYS:

1. THAT I AM THE PLAINTIFF IN THE ABOVE ENTITLED ACTION AND THAT I MAKE THIS AFFIDAVIT IN SUPPORT OF MY OPPOSITION TO DEFENDANTS MOTION FOR PRELIMINARY INJUNCTION WITH CROSS-MOTION FOR SUMMARY JUDGEMENT.

2. THAT I DO NOT RECEIVE ANY PERIODIC REVIEWS WHILE I AM HOUSED IN MODULE A, B, OR C.

3. THAT I AM NOT GIVEN AN OPPORTUNITY TO PARTICIPATE, IN ANY FORM, IN THE 30 DAY PERIODIC REVIEWS THAT I AM GIVEN WHILE IN PHASE ONE.

4. THAT I AM NOT GIVEN AN OPPORTUNITY TO DEFENDANT AGAINST THE FILING OF 106 MINOR MISCONDUCTS AGAINST ME.

5. THAT DEFENDANTS SAKAI, OKU AND SHOHET ARE DIRECTLY LIABLE BECAUSE THEY ARE THE ONE'S WHO PROMULGATED AND ENFORCED THE POLICIES DEPRIVING ME OF PARTIAL PARTICIPATING IN THE 30 DAY REVIEWS GIVEN TO PLAINTIFF WHILE IN PHASE ONE AND THE PRACTICES OF DENYING ME ANY REVIEW, WHILE I AM HOUSED IN MODULE A, B, AND C.

5 [sic]. THAT I AM SUBJECTED TO ONLY ONE HOUR OF EXERCISE AND RECREATION PER DAY FIVE DAYS A WEEK EXCLUDING WEEK ENDS WHILE CONTAINED IN PUNITIVE ISULATION [sic].

6. THAT DEFENDANTS OKU AND SHOHET ARE LIABLE FOR DEPRIVING ME OF ADEQUATE EXERCISE AND RECREATION WHEN THEY SUBJECT ME TO 22 HOURS OF PUNITIVE ISOLATION.

7. THAT I AM DENIED TO RECEIVE RELIGIOUS MATERIALS AND LITERATURE, MEDITATION BY DEFENDANTS OKU AND SHOHET.

8. THAT I AM DENIED TO RECEIVE ADEQUATE RELIGIOUS COUNSELING FROM MY RELIGIOUS LEADER BY DEFENDANTS OKU AND SHOHET, E.G., ONLY ONCE VERY THREE WEEKS AM I ALLOWED TO SEE MY RELIGIOUS LEADER.

9. THAT DEFENDANT OKU ALLOWS CHRISTIAN INMATES TO SEE THEIR RELIGIOUS LEADER TO COME INTO THE HOUSING UNITS IN ALL MODULES ONCE A WEEK TO DISTRIBUTE RELIGIOUS LITERATURE TO ANY INMATE WHO WANTS IT, YET MUSLIM INMATES AND ANY PROSPECTIVE INMATE WHO MAY WANT TO CONVERT TO ISLAM ARE DENIED TO HAVE OUR RELIGIOUS LEADER TO COME INTO THE HOUSING UNITS TO SHARE LITERATURE OF ISLAM.

10. THAT PLAINTIFF IS DENIED BY DEFENDANTS OKU AND SHOHET TO RECEIVE NEWSPAPER ARTICLES, BROCHURES, BOOKS AND MAGAZINES THROUGH THE MAIL AND I AM NOT NOTIFIED AND GIVEN AN OPPORTUNITY TO CONTEST THE MAIL CONSUM [sic] DECISION TO REFUSE ME TO RECEIVE ITEMS LISTED ABOVE THROUGH THE MAIL.

11. THAT DEFENDANTS OKU AND SAKAI CAUSED ME TO BE PUNISHED FOR PRAYING IN ARABIC BY DEFENDANTS PAAGA AND LEE, BY PROMULGATING AN ENGLISH SPEAKING ONLY RULE.

12. THAT I AM NOT ABLE TO FULLY DEFEND A MOTION FOR SUMMARY JUDGEMENT ON THE ISSUE OF RETALIATION AS I HAVE NOT BEEN ABLE TO RECEIVE ANY DISCOVERY THAT COULD LEND SUPPORT TO MY CLAIM OF RETALIATION.

13. THAT BASED ON INFORMATION AND BELIEF, THE S.M.C.P. IS A RULE THAT GOVERNS ALL OF HALAWA HIGH SECURITY FACILITY AS NO MATTER WHERE I AM IN THIS FACILITY I AM SUBJECT TO CONFORM TO THE RULES OF THE SEGREGATION AND MAXIMUM CONTROL PROGRAM (S.M.C.P.).

14. THAT BASED ON INFORMATION AND BELIEF, DEFENDANT FALK HAS TACITLY APPROVED OF ALL THE DEPRIVATIONS THAT I HAVE DISCRIBED [sic] ABOVE.

15. THAT EXHIBIT "A" IS A TRUE AND CORRECT COPY OF THE POLICIES AND PROCEDURES OF THE S.M.C.P.

16. THAT EXHIBIT "B" IS A TRUE AND CORRECT COPY OF THE REPORT AND RECOMMENDATION FILED BY MAGISTRATE CONKLIN IN *SIMS VS. FALK, ET AL.*, CIVIL NO. *88-034 DAE* ON SEPTEMBER 23, 1989 (U.S.D.C. D. HAW.) THAT WAS ADOPTED AS MODIFIED BY JUDGE DAVID A. EZRA ON JANUARY 4, 1990.

17. THAT EXHIBIT "C" IS A TRUE AND CORRECT COPY OF HAWAII REVISED STATUTES §§ 353-3, 353-4; . . . AND 35306.

18. THAT EXHIBIT "D" IS A TRUE AND CORRECT COPY OF TITLE 17 ADMINISTRATIVE RULES OF CORRECTIONS DIVISION § 17-200-1(2).

19. THAT EXHIBIT "E" IS A TRUE AND CORRECT COPY OF AN AFFIDAVIT OF DEFENDANT SHOHET FILED IN *SMITH, ET AL., VS. SAKAI, ET AL., CIVIL NO. 86-0156* (U.S.D.C., D. HAW.).

20. THAT EXHIBIT "F" IS A TRUE AND CORRECT COPY OF TITLE 17 §§ 17-201-4 THROUGH 17-201-20.

21 [sic]. THAT EXHIBIT "G" IS A TRUE AND CORRECT COPY OF THE S.M.C.P. INMATE GUIDELINES FOR GENERAL POPULATION OF MODULE "A", "B", AND "C".

21. THAT DUE TO THE MASS DEPRIVATIONS THAT I HAVE BEEN SUBJECTED TO AS DESCRIBED ABOVE – BUT NOT ONLY LIMITED TO THESE DEPRIVATIONS – I HAVE HAD NO RESPECT FOR PRISON AUTHORITIES, I HAVE BECOME QUICK TEMPERED, EVEN MORE VIOLENT. I KICK ON DOORS, AM VERBALLY ABUSIVE, CRY, EXPERIENCE HIGH ANXIETY, CRAMPS AND ACCUMULATE A COLLECTION OF MISCONDUCTS.

22. THAT WHILE IN MODULE B AND C MY BEHAVIOR IMPROVES DRAMATICALLY BECAUSE NOW I FEEL THAT I HAVE A BETTER CHANCE TO SHOW MY WORTH BY PARTICIPATING IN EDUCATIONAL AND/OR VOCATIONAL PROGRAMING, WHEREAS IN MODULES AND PHASE ONE I DO POORER BECAUSE I AM NOT GIVEN ANY INCENTIVE TO DO BETTER.

I AM NOT GIVEN ANY IDEA OF HOW LONG I WILL BE CONFINED IN THIS PHASES.

FURTHER AFFIANT SAYETH NAUGHT.

DATED: HONOLULU, HAWAII, DECEMBER 26, 1989.

RESPECTFULLY SUBMITTED,

/s/ DeMont R.D. Connor
DeMONT R.D. CONNOR,
PRO SE
97-902 MOANALUA HWY.
AIEA, HAWAII 96101

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. SIGNED THIS 26TH DAY OF DECEMBER, 1989.

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE

EXHIBIT "A"

POLICIES AND PROCEDURES
SEGREGATION AND MAXIMUM CUSTODY PROGRAM

HALAWA HIGH SECURITY FACILITY

INTRODUCTION

The Special Holding Unit at the Halawa High Security Facility (HHSF) has the capacity to house 12 inmates. Primarily intended for disciplinary segregation, it has also been used to house maximum custody inmates considered to need closer control and greater supervision than can be provided in Module A.

The Segregation and Maximum Custody (SMC) Program is based upon a system of behavior modification known as

operant conditioning. This means that inmates will be either positively or negatively reinforced as a consequence of specific behaviors. Inmates who demonstrate behaviors viewed as positive will be rewarded through forward movement in the program, while behavior seen as negative will result in setbacks of various types and additional time in the SMC program. The primary vehicle for regulating movement through the program will be sequential phasing.

The SMC Program will consist of two sequential phases. The first phase will include housing in Special Holding, while the second phase will be based in Module A.

PHASE I
MAXIMUM CONTROL PROGRAM

Selection Criteria

Inmates classified "Max" custody who are confined to Special Holding for disciplinary segregation will move to Phase I upon completion of that period. If an inmate commits a new misconduct for which he receives additional disciplinary segregation time, he will automatically revert to disciplinary segregation status as of the date of approval by the Facility Administrator.

Under unusual and compelling circumstances, the Program Committee may consider inmates for programming to the Maximum Control Program who are exceptions to the normal selection criteria. Circumstances in which such action may be taken include, but are not limited to, protective custody situations for which security in a residency module is not considered adequate,

and in extremely severe management or security problems where the safety, security or good government of the facility is compromised by less secure housing. The Program Committee will not assign Phase I status to an inmate who is not housed in disciplinary segregation at the time of the program committee action without approval of the Program Control Administrator.

Phase I Program

Phase I is a program status separate and distinct from disciplinary segregation. The length of time an inmate will spend in Phase I will vary depending upon his record of prior misconducts (if any), behavioral/attitudinal adjustment, and any other considerations which the Program Committee may consider to be relevant. Generally, inmates will be on Phase I status for between 60-120 days, but this time may be increased or decreased by the Program Committee to conform with the individual inmate's programmatic needs.

Upon completion of Phase I, inmates will normally move to Phase II, in accordance with programmatic needs established by the Program Committee. The principal criteria for evaluating an inmate's readiness to move to Phase II are:

1. Ability to abide consistently over time by all rules and regulations.
2. Absence of new misconducts.
3. Evidence of satisfactory, stable behavioral/attitudinal adjustment.

Judgements concerning an inmate's progress will be made by the Program Committee in consultation with the inmate's social worker, security personnel, and any other staff whom the Program Committee, in its discretion, chooses to consult.

Inmates programmed to Phase I will be housed in Special Holding.

Program Committee Reviews

Phase I inmates will be reviewed monthly by the Program Committee. Reviews more frequently than monthly will be made in exceptional circumstances, as determined by the Program Committee.

Administrative Review

The Program Control Administrator may terminate an inmate's Phase I status and release him to housing areas other than disciplinary segregation, Phase I or Phase II – either on the recommendation of the Program Committee or by administrative action where unusual or compelling circumstances indicate. He may also advance an inmate to Phase II status. This may not necessarily require a change in custody classification.

EXHIBIT D

Halawa High Security Facility

INMATE GUIDELINES
Segregation and Maximum Control Program
PHASE I

Inmates are subject to all State of Hawaii laws, Corrections Division policies (handbook) and HHSF policies and procedures. Any deviation from these guidelines may be subject to a program hearing, disciplinary action/ criminal charges.

The following are the guidelines for inmates programmed to Phase I of HHSF:

SELF-REPRESENTATION

1. Inmates shall not be allowed to govern or order another inmate.
2. There will be no group representation. All inmates will be self-represented.

MOVEMENTS

3. All cell doors shall remain locked at all times unless authorized or permitted to be opened.
4. Only one inmate at a time shall be allowed out of his cell when authorized or permitted. While out of his cell, he shall go directly to and from his authorized destination and not loiter, visit with other inmates, or in any way delay his return to his cell.
5. Whenever an inmate is authorized to be moved out of Special Holding, that inmate shall be leg-ironed and waist-chained at all times during his absence.

6. All inmates in Special Holding shall be strip-searched upon leaving and returning to Special Holding.
7. Inmates must be properly dressed in HHSF uniform and footwear must be worn at all times when leaving Special Holding, except for legitimate reasons. (Exceptions: Uniforms do not have to be worn at recreation time and upon being escorted to court jury trials.)

SPECIAL HOLDING STANDARDS

8. No defacing of walls, windows, fixtures, and equipment.
9. There will be no obstruction to the see-through glass (window) on the cell door, light fixtures, and vents.
10. Stringing of clothes lines shall not be permitted.
11. Inmates shall not use abusive or obscene language towards any staff member.
12. All dayroom lights and all cell lights will be turned off at 10:00 p.m. All lights will be turned back on at 5:30 a.m.
13. Cellars must be clean, orderly, and ready for inspection at all times.
14. Razors will be available for use daily as scheduled. Exceptions will be made for those inmates scheduled for official appearances. (i.e. Court, parole hearings, etc.)
15. Television privileges shall not be permitted.

16. No item shall be given to a staff member to be passed to another inmate.

17. Blankets, sheets, pillows, pillow cases, laundry bags and mattresses shall be kept in the inmate's cell.

18. Upon any lockdown period, any personal property left in the dayroom and shower areas will be confiscated.

19. Inmates shall not pass or receive any items under their cell door to/from another inmate under any circumstance.

20. Cardbord boxes, plastic containers, plastic bags, glass containers, cans, or any implement of storage shall not be permitted or stored in an inmate's cell. (Exception: Dentist/Unit Team approved containers for dentures.)

21. Jewelry and watches of any type shall not be permitted.

22. Radios, tape recorders, and all electronic entertaining devices shall not be permitted.

23. Instruments of music shall not be permitted.

24. No inmate shall have money in his possession. All money will be considered contraband and subject to confiscation. There will be no transferring of money from one HHSF inmate account to another.

25. The toilet shall not be used as a disposal of discarded authorized items. Except for toilet paper, no authorized item for retention shall be flushed through the toilet.

MEALS

26. After each meal, all trays will be put in an orderly fashion outside of the cell. *No food will be stored in the cell.*

AUTHORIZED ITEMS FOR RETENTION

27. Except for the items listed below, nothing else is permitted for retention by the inmate in his cell. All excess personal items will be kept in the inmate's property storage area until arrangements by the inmate can be made for it to be sent out of the facility (via i.e. family, friends, or mailed out).

    a. One tube toothpaste (HHSF issued or through inside store order only)

    b. One toothbrush

    c. One bar of soap (HHSF issued)

    d. One roll toilet paper

    e. two towels and two washcloths

    f. one mattress

    g. one blanket

    h. one Bible or religious publication

    *i. four sheets of writing paper – with or without lines, i.e. typing paper (not to exceed 8½" x 11") (HHSF issued)

    *j. one tablet of writing paper – with or without lines, i.e. typing paper (not to exceed 8½" x 11") (through inside store order only)

    k. one pencil (no pens)

*l. two letter size envelopes (HHSF issued)

*m. one package of 75 letter size envelopes (through inside store order only and kept in the control station, issued upon written request)

n. one pair slippers

o. one pair athletic shoes

p. four issued T-shirts (white)

q. four undershots [sic]

r. four pairs socks (white athletic socks)

s. one blue sweatshirt (through store order only)

t. Two pants (HHSF uniforms)

u. Two shorts (athletic type, solid color, no pockets)

v. one comb (HHSF approved)

w. one *Inmate Handbook* (given upon request)

x. one legal book pulication [sic] or transcript directly related to your case

y. stamps (limited to one book)

z. laundry bag (HHSF issued)

aa. four incoming correspondence/letters

Authorized items for retention, as herein listed, shall not be altered or used other than the way it was intended to be used. All store ordered items shall be purchased on a trade-for-trade basis.

28. *Court clothes* will be permitted but will be kept in the property room. Court clothes will consist of one (1) set of dress clothes, one (1) pair of dress shoes, and one (1) pair of dress socks. All subsequent court clothes will be accepted on a trade-for-trade basis.

29. All HHSF-issued property is the inmate's responsibility. Any damage, loss, etc., to issued property may result in a misconduct report being filed against the inmate assigned the property which may include his having to pay for the property.

PROHIBITED ITEMS

30. Anything not specifically authorized for possession, conveyance or introduction onto the Halawa High Security Facility compound by the facility administrator shall be considered contraband. Inmates violating this section shall be subject to appropriate disciplinary sanctions which may include criminal charges.

31. Cigars, cigarettes, tobacco in any form or derivative, and/or smoking paraphernalia shall not be permitted. Inmates shall not request for cigarettes from staff.

COMMUNICATION

32. All requests will be in writing except for emergency situations.

33. Except in cases of medical emergency, all requests for medical attention must be in writing. No inmate shall possess any medication.

34. ACOs will accept requests from the inmates for toilet paper, soap, and sharpening of pencils only once daily in the morning.

35. Inmates shall communicate in the English language only; including telephone calls, visits and letters.

    Exception: A written request must be submitted and approved by the Unit Team for an inmate to speak a foreign language to a non-English speaking person which includes immediate family members.

36. *Official Visits* as defined in the *Inmate Handbook,* Section 17-203-2, (i.e. legal counsel, ombudsman, etc.) shall be permitted at any reasonable hour in accordance with applicable division and facility policies. Official visitors are encouraged to make prior appointments with the facility.

Personal Visits privileges shall be limited to two (2) one-hour non-contact visits per month as scheduled, except Saturday, Sundays, and holidays. Phone #1 shall be utilized for non-contract visits unless otherwise instructed by staff. Immediate family may visit during personal visiting periods. Immediate family shall be defined as wife, mother, father, sister, brother, daughter, and son – whether natural or hanai. Non-immediate family members and friends may be permitted to visit subject to the following conditions:

Requests for such visits must be made in writing by the Phase I inmate to the

social worker no less than three working days prior to the date of the proposed visit. The request must be approved by the Unit Manager before it may be scheduled. One the visitor has been approved by the Unit Manager, he or she may visit the same Phase I inmate on subsequent occasions without having to be approved in this manner prior to each visit.

Denial of such visits will be for cause. The reasons for denial will be furnished in writing to the inmate. Where confidential information is involved, a general summary will be provided to the inmate. Denial of visits under this provision will be for the safety, security, and good government of the facility only. The prospective visitor's criminal record, if any, will be considered. Non-immediate family and friend visitors will be permitted to visit only one Phase I inmate.

Special Immediate Family Visits will be limited to off-island immediate family only. If they are unable to visit during regular visits as scheduled, they may request ahead of time for a special visit. If approved, the special visit will be for one (1) hour duration on a weekday during business hours. Airline tickets must be presented as verification of off-island status and the actual dates of stay on Oahu.

CORRESPONDENCE

37. Incoming or outgoing mail to and from inmates or wards will be inspected and

read. Privileged mail as described by the *Inmate Handbook* should normally be inspected for contraband in the presence of the inmate/ward.

38. There is no restriction on *incoming personal letters* but inmates are allowed to keep only four (4) personal letters in their possession. Only personal letters may be received by inmates. All other items such as photographs, newspaper clippings, crossword puzzles, brochures, etc., will automatically be placed into his property.

*39. *Outgoing personal correspondence* will not be limited. Each letter will be no more than two sheets of paper – no larger than 8-1/2" x 11".

*40. Inmates will be responsible for the purchase of writing materials and are only purchaseable through the inside store order.

*41. All outgoing mail will be picked up from the cells, daily at lights out; 10:00 p.m.

LAUNDRY

42. Laundry services are provided twice a week as scheduled.

43. Blankets will be exchanged once a month as scheduled.

44. All clothing will be marked by name to assure proper return after laundry days.

TELEPHONE

45. *Official* telephone calls will be limited to one (1) call per day, as scheduled and limited to five (5) minutes per call, except

Saturdays, Sundays, and holidays. Telephone calls to and from the ombudsman shall be permitted at any reasonable hour without delay.

Personal telephone calls will be limited to one (1) scheduled personal telephone call per month, not to exceed ten (10) minutes.

STORE ORDERS

46. Inmates with available funds shall purchase, upon approval from the Special Holding ACO IV, through the inmate commissary *only* these items: toothpaste, toothbrush, comb, slippers, sweatshirt and stamps. These items shall be purchased *only* as they are needed and on a trade-for-trade basis. No other items are allowed to be purchased.

47. For medical reasons, items such as soap may be purchased from the inmate commissary, upon prior written approval from the facility physician. Inmates are responsible for purchasing these items with their available funds and *only* as the need for these items arise.

EXERCISE PERIOD

48. Inmates shall be allowed to have one 60-minutes indoor or outdoor exercise period per day as scheduled excluding weekends and holidays, unless compelling security or safety reasons dictate otherwise.

SHOWERS

49. Inmates shall be scheduled daily showers for a reasonable period of time not to

exceed ten (10) minutes, unless compelling security or safety reasons dictate otherwise.

INCOMING/OUTGOING PERSONAL ITEMS

50. Inmate transactions regarding trade-for-trade court clothes may be brought in via family and friends on weekdays, except holidays, between 8:00 a.m. and 1:30 p.m. only. (Note: No books or magazines will be accepted.)

MONEY

51. *Incoming money* may be accepted through the mail in the form of money orders or cashier's check only. Incoming money (money orders, cashier's check, and cash) may be brought to the facility between 8:00 a.m. and 4:00 p.m. *Personal checks will not be accepted at any time.*

52. *Outgoing money* – Inmates may make written requests to send their "spendable account" money out. The inmate is to state to whom the money is going, the amount, and the reason for the withdrawal. Upon approval by the Unit Team, a check will be given to the inmate's respective Case Manager for appropriate disposition.

These guidelines of the Segregation and Maximum Control Program (SMCP), Phase I, may be revised, modified, or amended without notice from time to time, upon approval of the Corrections Manager.

Effective date of SMCP Phase I guidelines: Upon approval.

APPROVED:

/s/ William Oku
William Oku,
Corrections Manager II
9/24/86
Date

*Denotes revisions on 9/24/86.

EXHIBIT "E"

CORINNE K. A. WATANABE
Attorney General
State of Hawaii

LILA B. LeDUC
Deputy Attorney General
State Capitol
Honolulu, Hawaii 96813
Telephone: 548-4740

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TERRY SMITH, SCHUYLER DeCAIRES, CLEVELAND KING, Plaintiffs, vs. TED SAKAI, et al., Defendants.	Civil No. 86-0156 AFFIDAVIT OF LAURENCE S. SHOHET; EXHIBITS A and B

AFFIDAVIT OF LAURENCE S. SHOHET

STATE OF HAWAII)
) SS:
CITY AND COUNTY OF)
HONOLULU

LAURENCE S. SHOHET, being first duly sworn, on oath deposes and says that:

1. He is employed by the State of Hawaii as the Program Control Administrator for Halawa High Security Facility (HHSF) and has been so employed since April 1, 1981. In the absence of administrator William Oku, he is usually the acting Administrator for the facility;

2. Since 1981, HHSF has served as the high or maximum security facility for the State of Hawaii;

3. In 1981, he was involved in the development and implementation of the Segregation and Maximum Control Program (SMCP);

4. The program is geared to the security needs of a high security facility and consists of a phasing process whereby inmates demonstrating satisfactory adjustment move up to the next phase and gain greater privileges with each movement. The inmate's length of stay is not fixed in a phase; his progress is based upon his behavior which determines how rapidly or slowly he moves through the system. Some inmates leave phase one well before their first 30-day review due to good behavior;

5. This gradual process allows for closer monitoring and more accurate assessments of an inmate's adjustment and readiness for the next phase;

6. The program and its policies and procedures developed out of the concern of Corrections Division (CD), the Ombudsman's Office, and other departments that specific and clearly defined rules be in place for disciplinary segregation and the sequential phasing following completion of disciplinary segregation time;

7. The program went into effect in August 1981, and to his knowledge has not been formally challenged by

administrative grievance or lawsuit, apart from the challenge from plaintiffs herein;

8. The program and its policies and procedures were authorized by HHSF Administrator Oku prior to implementation and although not mandated by state law or rule, were approved on August 24, 1981, by Edith Wilhelm, then Corrections Division Assistant Administrator for Michael Kakekasako, then Administrator of the Corrections Division, Department of Social Services and Housing;

9. No HHSF inmates have physical access to the library. The general population inmates have access to the librarian. Inmates may make written requests to the librarian for pending cases or if they are contemplating filing an action;

10. Plaintiffs, who are in the special holding unit, are permitted one legal item at a time in their cell; the item may then be exchanged for a different item; they are not permitted reading material, other than a bible or its equivalent, because of the physical configuration of the cell area where they are located which would permit the unauthorized shuffling of items from cell to cell due to a recess in the floor of the connecting corridor;

11. Attorneys have virtually unrestricted access to the facility, and they are always accommodated within reasonable limits; arrangements may be made for visitation until 9:00 p.m. Monday to Friday, and weekends as well;

12. All HHSF inmates, regardless of segregation status, are permitted one official telephone call per day for

five minutes to an attorney, a government official, the ACLU, the Ombudsman, or the like. If more time is needed, the attorney or other individual may call the inmate back and speak as long as necessary;

13. All HHSF inmates, regardless of segregation status, are subject to the same outgoing mail contraband search policy. An inmate hands his letter to staff in his housing area, unsealed. The staff member looks into the envelope merely to determine that it contains only paper with writing. It is then sealed in the inmate's presence and forwarded to the mail censor who logs the item prior to mailing. In the case of Terry Smith, his official mail is skimmed initially to verify if it is indeed official mail because he recently abused his official mail privileges by mailing an official letter to an Alaskan courthouse for reforwarding to a friend. The letter contained several criminal proposals, and was returned to HHSF by the Alaska court clerk's office;

14. Inmates in Special Holding are not allowed to possess a pen but are allowed a pencil within their cells. Due to the idle time possessed by segregation inmates, they have in the past used pens for self-mutilation and tatooing [sic] which has required medical treatment. For pending legal actions or requirements, provision is made for ink to be used;

15. Inmates in Special Holding may have four pieces of free writing paper per day, but special needs, e.g. legal cases, are accommodated. Security and safety issues have arisen from large allotments of paper, e.g. fires and clogging of plumbing. Typewriters are not available to any inmate in HHSF. Free envelopes are available

to segregation inmates, two per day, for oficial [sic] correspondence. Additional free envelopes are provided for legitimate need. All inmates are provided free notary service which is scheduled for them pursuant to a proper written request;

16. No HHSF inmate is provided xeroxing services, (apart from xeroxed items supplied by librarian to him) but in the past, an urgent need was accommodated for an inmate. Inmates may mail out for copying any item they wish to have xeroxed;

17. Inmates in disciplinary segregation are permitted to send two pieces of personal mail per day. They are permitted one one-half hour visit per month from immediate family;

18. Inmates in phase 1 have no restriction on the amount of personal mail they send. They are permitted visits from friends as well as family, and may place a personal telephone call each month for up to ten minutes;

19. Special Holding inmates are not permitted smoking materials or cosmetics. They are allowed a daily shower of up to ten minutes and are provided necessary toiletries and grooming items;

20. Disciplinary segregation time may be imposed concurrently or consecutively to any disciplinary segregation time being served, i.e. new misconducts can result in consecutive punitive terms. Upon the completion of disciplinary segregation sanctions of more than four hours, a maximum custody inmate will enter Phase 1. Inmates with lower custody classifications will return to their original housing area. Phase 1 inmates who have

not progressed out within thirty days receive monthly review;

21. Disciplinary and administrative segregation time is imposed through procedures which comport with due process, and in accordance with Title 17, Administrative Rules of the Corrections Division, Subchapters 2, 3, and 4. A true copy of these subchapters is attached hereto as Exhibit A;

22. Programming decisions, regarding classification, assignments, housing, worklines, education, and the like comport with due process requirements. Program committee hearings are held on these matters where there is any potential deprivation. The committee normally consists of three people, the inmate is allowed to appear with counsel substitute, and reasonable cross examination and discovery are permitted. The hearing and attendant procedures are in accordance with Title 17, Administrative Rules of the Corrections Division, Subsection 1. A true copy of this subsection is attached hereto as Exhibit B; Where there is any potential for deprivation, inmates are present at a noticed hearing; in cases where no deprivation is at issue, the matter is handled informally;

Further Affiant sayeth naught.

/s/ Laurence S. Shohet
LAURENCE S. SHOHET

Subscribed and sworn to before me
this 8th day of August 1986.

/s/ _____
Notary public, State of Hawaii
My commission expires: 6/8/90

[Exhibits Hereto Deleted]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF JANICE NEILSON

(Filed Sept. 24, 1990)

I, JANICE NEILSON, under penalty of perjury do hereby declare that:

1. I am the Librarian for the Halawa Correctional Facility and have been since February of 1990. I oversee the operations for both the Medium Security Facility Law Library and the High Security Facility Law Library.

2. For the month of June 1990, Plaintiff was scheduled to use the law library for three hours on June 6, on June 21, on June 25, and on June 27. He was not scheduled to use the law library on the week of June 11th because a request was not timely received. He did not attend on June 25 and June 27 because he was moved to the Special Holding Unit.

3. Inmates at both the High Security and the Medium Security Facility are required to make a written request in advance to attend the law library. They are given a minimum of three hours of access a week and are allowed an additional three hours if [a] they have a docketed court case and/or [b] space is available. Plaintiff is normally scheduled for six hours a week because he has a docketed court case. The schedule will list every inmate who is to use the law library. This schedule reflects two other standard procedures, that inmates from different modules or housing units are not mixed and there is a limit on the number of inmates who can attend per session.

In order for the inmate's name to appear on that week's schedule, his request to use the law library must be received the Wednesday prior to that particular week. Copies of that schedule are then sent to security personnel and the individuals who enable the inmates to be moved to and from the law library. The schedules and the requests are regularly made in the operation of the library. All these documents are filed and they are official records of the Department of Public Safety.

We did not receive a request from Plaintiff during the week of June 6. If we had, however, he would have been scheduled. We did receive two requests on June 13. Attached hereto as Exhibits B and C are true and correct copies of the original requests kept in the library's files. Because they were received on the 13th, it was too late to schedule Plaintiff for the week of June 11.

Attached hereto as Exhibits D, E, and F are, respectively, the High Security Facility's law library schedules for the week of June 4, June 18 and June 25th. These are true and correct copies of originals kept in the library's files.

4. If an inmate is moved to the Special Holding Unit after the schedule is made and circulated, he will not attend the law library as scheduled. The reasons for this include the fact that it is too late to redraft the schedule, the inmate cannot attend as scheduled because of the prohibition against mixing inmates, and frequently the maximum number of inmates allowed to attend for that module has already been reached. In order to accommodate the recent arrival, someone else would have to be bumped off the list.

Because Plaintiff was moved to the Special Holding Unit, he did not attend the law library as scheduled on the 25th and 27th of June.

5. The law library at both the High and Medium Security Facilities are required to be staffed by a librarian or a library assistant. Adult Corrections Officers (ACO) do not and have not been used to keep the law library open. As I understand, there is a shortage of ACO's and requiring an ACO to staff the law library would mean another post in the facility would not be staffed by an ACO. ACO's do bring prisoners to and from the law library and one does usually sit in the learning center room at the High Security Facility when the law library is open. The ACO in the learning center, however, monitors the inmates in the learning center. He can see into the law library but he is not and never has been assigned to monitor the law library. That is the librarian's duty.

There has been only one exception to this rule and that occurred on the 21st of June where Cinda Sandin arranged for Plaintiff to use the law library with no staff present.

6. On May 31, 1990, the law librarian for the High Security Facility quit without notice. He left on a medical emergency. Because he left unexpectedly, there was no opportunity to hire a replacement librarian prior to his departure.

7. The High Security Facility law library was kept open by librarians and library staff borrowed from other facilities. The High Security Facility's law library hours were curtailed in June. On July 12, the law library resumed its normal hours of operation and is kept open

by people on emergency hire status and other personnel. I have reviewed the request and schedules since that date and note that Plaintiff has been scheduled for six hours a week in the law library when he requests.

8. We have been in the process of hiring a law librarian for the position at the High Security Facility. That position is similar to mine in that it is a civil service position. Before persons can be hired for a civil service position, they must go through a time consuming process which includes tests, security clearance, and checks into their backgrounds.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, Sept. 20, 1990.

/s/ Janice Neilson
JANICE NEILSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

DECLARATION OF SHELLY NOBRIGA

I, SHELLY NOBRIGA, under penalty of perjury do hereby declare that:

1. I am the Acting Unit Team Manager for the Halawa High Security Facility. I have served in this capacity since February 1990 and have been employed by the Halawa Correctional Facility since December 1988.

2. As part of my duties, I have access to all the inmates' files who are housed in these particular units at the High Security Facility. I also handle a portion of the inmate request forms and have access to the file in which inmates' grievances are kept. The documents kept in the inmates' files, the inmate request form and the inmate grievances are made in the regular course of operations at the Halawa High Security Facility. They are prepared by individuals who are under a duty to tell the truth. I have seen and filed documents in every inmate's file who has been incarcerated at the Halawa High Security Facility since September 1989.

2. I am fully aware of Plaintiff's court order. As part of that order I understand he is to be given a tablet of paper, though the cost of that tablet is to be debited in his account, and be given access to a pen when he requests until 10:00 p.m. Plaintiff is supposed to procure these items from the Facility's commissary. To obtain items he must submit a store order form. These forms are picked up once a week.

If he experiences any problems with obtaining a pen or paper, he usually submits a written request to me. A tablet of inmate request forms are kept in each module. The requests are picked up once a day by an Adult Corrections Officer before breakfast, Monday through Friday. All the requests, except for those for attorney phone calls, toiletry items, laundry and requests to speak with the module sergeant are handled by me. I have gone through the file which contains his requests. He filed 11 requests in May and 23 requests in June. Only one of those was for a pen and paper. Attached hereto as Exhibit G is a copy of that request, the original of which is an

official record of the Department of Public Safety. He made the request on the 21st of May, and he was given pen and paper on the 22nd. It was for one pen and one tablet.

I have gone through the grievance file and found that Plaintiff filed two grievances in May and one grievance in June. None of those grievances mentioned either a pen or paper.

Attached hereto as Exhibits H and I are, respectively true and correct copies of the misconduct prepared on June 21, 1990 and the Memorandum sent to the District Court regarding the shortage of staff from the library. The originals are official records of the Department of Public Safety.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 20, 1990.

/s/ Shelley Nobriga
Shelley Nobriga

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

DECLARATION OF CINDA SANDIN

I, CINDA SANDIN, under penalty of perjury do hereby declare that:

1. I am the Residency Section Supervisor for the Halawa High Security Facility and have been since Septmeber [sic] 16, 1989. I have been employed by the Department of Public Safety since March 14, 1983.

2. Because of a shortage of library staff I arranged to have Plaintiff taken to the law library on June 21, 1990, even though no staff would be present in the law library. On that day, however, Plaintiff was moved to the Special Holding Unit because he was suspected of violating prison rules.

3. As a matter of procedure, when inmates are moved to the Special Holding Unit, they do not attend the programs they are scheduled for. This is partly due to the incident which caused the move and the logistics of moving inmates and their property.

Also, inmates housed in one module or unit are not mixed in central gathering areas such as the law library with inmates from other modules. This inhibits the flow of information and contraband between modules. Controlling the flow of contraband is a never-ending problem, recently a library book was used to smuggle thirteen cigarettes into the Special Holding Unit.

Further, inmates are segregated to prevent inmate violence. Inmates do hold grudges and will take revenge. Strictly controlling inmate housing and preventing inter-unit mingling reduces prison violence.

In order for a particular inmate to be rescheduled for his programs he must submit a written request for placement on the next schedule. If the next week's schedule has already been prepared however, he will have to wait for the following week.

4. Even though Plaintiff was moved after the law library schedule was made for the week of June 25th, he was taken to the law library that week. This was due to the fact that he had a court order commanding that he be given law library time.

5. I have provided Plaintiff with pen and paper on numerous occasions though he is supposed to get these items from the commissory via store orders. I keep a supply of pens and paper in my office just in case the commissary does not supply Plaintiff with pen and paper.

Plaintiff has informed me in the past that he needs pen and paper by either writing grievances, requests or confidential letters. He frequently writes letters complaining about virtually every aspect of the prison.

I was not aware of any problems Plaintiff may have had in the month of May. He did not demand a pen or paper in a request, grievance or letter for that month. If he had, I would have provided him with these items.

Regular operations of the Special Holding Unit requires a log of inmate movements to be kept. This log is kept by individuals under a duty to report truthfully and

accurately. It is prepared soon after the events creating the entry occur. Attached hereto as Exhibit J is a copy of that log for June 21st, 1990. This is a true and correct copy, the original of which is an official record of the Department of Public Safety.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 21 ,1990.

/s/ Cinda Sandin
CINDA SANDIN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

DECLARATION OF DAVIS HO

I, DAVIS HO, under penalty of perjury do hereby declare that:

1. I have been employed as the commissary clerk for the Halawa Corectional [sic] Facility for approximately three years.

2. Inmates can submit store orders on a weekly basis. If they have sufficient funds and are allowed to purchase the requested items, the items and the store orders are sent to the inmate. The inmate is required to sign at the bottom of the form acknowledging receipt of the items. The signed store order forms are returned to the commissary and filed.

3. Attached hereto as Exhibit A are DeMont Conner's store order forms for pen and paper from January 1990 to the end of June 1990. (The store order forms for the weeks of May 14, May 21 and May 28 cannot be located) These are true and correct copies.

4. Conner's store orders for pen and paper were routinely filled until the first week of May, 1990. Through oversight or inadvertence his orders were not filled for the next four weeks. In early June, I was alerted by someone at the Halawa High Security Facility that DeMont Conner had not been receiving a pen and paper. I promptly filled the next store order for pen and paper, which Conner acknowledges receipt on June 14, 1990. his store orders have continued to be filled.

I declare under penalty of perjury that the foregoing istrue and correct.

DATED: Honolulu, Hawaii, September 21st , 1990.

/s/ Davis Ho
DAVIS HO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

DECLARATION OF CARL ZUTTERMEISTER

I, CARL ZUTTERMEISTER, do hereby declare under the penalty of perjury that:

1. I am employed as a Library Technician at the Halawa Correctional Facility and have been since April 23, 1990.

2. I was the staff member assigned to the law library at the Halawa High Security Facility on June 6 and June 26, 1990. On the 6th, DeMont Conner was in the law library for approximately three hours. On the 26th, DeMont Conner used the law library for approximately two and one-half hours.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, September 24, 1990.

/s/ Carl Zuttermeister
CARL ZUTTERMEISTER

DEFENDANT'S EXHIBIT J

HALAWA HIGH SECURITY FACILITY
SPECIAL/HOLDING

DATE JUNE 21, 1990 **DAY** THURSDAY

ACO'S WONGHAM & KOA (2ND, WATCH)

ADDRESSEE	INFORMATION	INFORMER
HEAD COUNT	MADE BY PRICE OFF & WONGHAM ON. . . . H/C (10)	0600
CHOW SERVED	TO INMATES BY ACO KOA/SGT APAO.	0550
FLOOR CHECK	ALL APPEARS NORMAL	0600
CHOW PAU	TRAYS/UTENSILS ACCOUNTED FOR	0615
LAUNDRAY [sic]	P/UP BY ACOS	0615
RECREATION	FOR KING	0600
WEISSMAN	CANCEL, REC, SHOWER, Note: INMATE WEISSMAN DID NOT EAT	0615
SHOWER	FOR SIMS	0620
FLOOR CHECK	ALL APPEARS NORMAL	0630
SHOWER	FOR TEO	0645
FLOOR CHECK	ALL APPEARS NORMAL	0700

REC FINISH	FOR KING AND SHOWER	0710
REC START	FOR SIMS	0715
FLOOR CHECK	ALL APPEARS NORMAL	0730
FLOOR CHECK	ALL APPEARS NORMAL	0800
MEDICATION	HAMMOND, KING, WEISSMAN, SIMS, CARREIRA, BY WONGHAM/APAO.	0800
REC FINISH	FOR SIMS	0810
REC START	FOR BRIONES	0815
FLOOR CHECK	ALL APPEARS NORMAL	0830
FLOOR CHECK	ALL APPEARS NORMAL	0900
REC FINISH	FOR BRIONES AND SHOWER	0905
REC START	FOR LEALAO	0910
FLOOR CHECK	ALL APPEARS NORMAL	0930
MOVEMENT	INMATE, CONNERS FROM THE MEDICAL UNIT.H/C.. . . . (11)	1005
REC	COMPLETED FOR LEALAU, SHOWER 1 FOLLOWED	1035
CHOW SERVED.	ALL INMATES FED BY ACOS WONGHAM AND KOA	1045

CHOW DONE	ALL TRAYS AND UTENSEL [sic] P/UP BY ACOS KOA AND WONGHAM	1105
REC	FOR CARREIRA, COMMPLETED [sic], REC. SHOWER FOLLOWED	1105
REC	FOR CONNERS, rec Completed SHOWER FOLLOWED	1110
SHOWER	FOR INMATE HAMMOND	1220
LATE ENTRY	INMATE WEISSMAN HAD LUNCH	1045
REC	FOR INMATE SUA	1305
FLOOR CHECK	ALL APPEARS NORMAL	1330
LATE ENTRY****	INMATE WEISSMAN DID EAT LUNCH TODAY.	1330
HEAD COUNT	MADE BY WONGHAM OFF APAO ON . . . HC (11)	1400

HALAWA HIGH SECURITY FACILITY

MEDICAL UNIT

DATE JUNE 21, 1990 **DAY** THURSDAY

SECOND WATCH: SGT. APAO O/T

ADDRESSEE	INFORMATION	INFORMER
HEAD COUNT	MADE BY SGT. APAO ON AND ACO GISHI OFF. . . . H/C 07. . . .	0600
CHOW SERVED	TO ALL INMATES BY ACO NEGRONE/ RAMOS	0605
CHOW PAU	ALL TRAYS COLLECTED AND ACCOUNTED FOR BY STAFF	0625
FLOOR CHECK	ALL APPEARS NORMAL	0630
FLOOR CHECK	ALL APPEARS NORMAL	0700
FLOOR CHECK	ALL APPEARS NORMAL	0730
MEDICATION	FOR INMATES LOHER AND CONNORS	0750
FLOOR CHECK	ALL APPEARS NORMAL	0800
FLOOR CHECK	ALL APPEARS NORMAL	0830

MOVEMENT	INMATE TAMURA ESCORTED TO STAFF DININGROOM WORKLINE	0900
LEGAL CALLS	MADE AT THIS TIME FOR INMATES [sic] CONNORS,	0925
FLOOR CHECK	ALL APPEARS NORMAL	0930
MOVEMENT	INMATE CONNORS SENT TO S/H HIGH FROM MED. UNIT PRE=HEARING	0957
FLOOR CHECK	ALL APPEARS NORMAL NEW H/C . . . 06 . . .	1000
FLOOR CHECK	ALL APPEARS NORMAL	1030
FLOOR CHECK	ALL APPEARS NORMAL	1100
CHOW SERVED	TO ALL INMATES BY SGT. APAO AND NEGRONE	1115
FLOOR CHECK	ALL APPEARS NORMAL	1130
CHOW PAU	ALL TRAYS COLLECTES [sic] AND ACCOUNTED FOR BY M.A.STAFF	1145
FLOOR DHECK [sic]	ALL APPEARS NORMAL	1200

RECREATION	FOR INMATES QUAD ONE OUT LOPEZ, LOHER, TAMURA, BY SGTAPAO/NEGRONE	1230
FLOOR CHECK	ALL APPEARS NORMAL	1300
RECREATION	OVER INMATES RETURNED TO QUAD TAMURA, LOPEZ, LOHER/APAO/ NOGRONE [sic]	1330
FLOOR CHECK	ALL APPEARS NORMAL	1335
HEACOUNT [sic]	MADE BY SGT. APAO OFF AND M.A. STAFF. . . . 06. . . . H/C	1400
	**********	
LATE ENTRY	INMATE LOHER ESCORTED TO INTERVIEW ROOM	1335
	**********	

In the United States District Court

For the District of Hawaii

[Caption Omitted In Printing]

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed May 15, 1991)

A Report and Recommendation having been filed and served on all parties on 1/31/91, and

No objections having been filed by any party,

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to Title 28, United States Code, Section 636(b)(1)(C) and Local Rule 404-2, the Report and Recommendation is adopted as the opinion and order of this Court.

DATED at Honolulu, Hawaii MAY 14 1991.

/s/ Alan C. Kay
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

REPORT RE: PLAINTIFF'S ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING JUDGE KAY'S 1988 PRELIMINARY INJUNCTION

Factual Background

(Filed Jan. 31, 1991)

Plaintiff, an inmate at Halawa Correctional Facility (High Security), filed his § 1983 civil rights complaint on March 14, 1988 alleging that Defendants violated his Due Process rights by sentencing him to sixty days disciplinary confinement (special holding) without affording certain procedural protections at the Disciplinary Committee hearing.

Plaintiff later amended his complaint on two occasions, the last being filed on September 8, 1989, to include a variety of allegations relating to the Halawa phasing program (so-called behavior modification), conditions of special holding, and various other rules regulating mail, medical care, and other aspects of prison life.

The subject of this Report and of at least seven past motions by Plaintiff for Writ of Habeas Corpus, Temporary Restraining Order, or Preliminary Injunction relates to Plaintiff's access to the Halawa law library and his general access to the courts.

The Preliminary Injunction

On December 2, 1988, Judge Kay adopted this Court's Report recommending that a preliminary injunction (PI) be issued providing that Defendants must do the following:

> "a) Allow the inmate direct physical access to the law library commensurate to that which other medium security inmates enjoy, or provide the inmate with trained legal assistance;
>
> b) Permit the inmate to retain personal legal materials in his locker on a permanent basis rather than the 2 book and 6 case limit;
>
> c) Furnish the inmate with an entire writing tablet of paper and debit the inmate's account; and
>
> d) Permit the inmate to retain an ink pen until 10:00 pm when requested."

Order, December 2, 1988, at 4.

Defendants later moved to modify the PI and Judge Kay granted that motion on March 30, 1989. The PI was modified so that Defendants could satisfy it by sending Plaintiff to the law library at the High Security prison instead of the Medium Security prison. Also, that Plaintiff would be allowed to keep in his cell only two books and four inches of legal papers.

Plaintiff's Order to Show Cause

On July 13, 1990, Plaintiff filed a motion for a contempt hearing for violation of the PI. Plaintiff complained

that Defendants were making a complete mockery of the Court by ignoring or not complying with the PI. Specifically, Plaintiff made the following claims:

1) only four hours library access in last four weeks;

2) periodic denial of writing tablet and pen;

3) xeroxed materials returned only after a week's wait;

4) no copy machine available in the High Security library;

5) trouble getting manila envelopes for mailing;

6) arbitrary approval requirement for legal papers; and

7) harassment by law library A.C.O.s

Plaintiff also requested the Court's intervention to keep prison officials from deducting certain funds from Plaintiff's account for paper and pen or to set a certain percentage below which the Defendants would not be able to apply to Plaintiff's debt. Plaintiff requested an immediate hearing on his contempt motion and seeks both criminal[1] and civil contempt. Judge Kay designated hearing on Plaintiff's motion to this Court on August 16, 1990. Further pleadings were ordered.

---

[1] Plaintiff has no authority to seek criminal contempt. *See* F.R. Crim. P. 42; Wright, *Federal Practice and Procedure:* Criminal 2d § 701-715 (1982).

Legal Standard

A finding of civil contempt requires clear and convincing evidence that prison officials have not taken all reasonable steps within their power to comply with the Order. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). Substantial compliance is a defense and "if a defendant's action appears to be based on a good faith and reasonable interpretation of [the court's order], he should not be held in contempt." *Diamontiney v. Borg*, 918 F.2d 793, 797 (9th Cir. 1990). Moreover, technical or inadvertent violation of an Order generally will not support a finding of civil contempt. *General Signal Corp. v. Donallco Inc.*, 787 F.2d 1376 (9th Cir. 1986).

Response and Reply

Defendants filed their response on September 24, 1990. Only two of the seven specific claims[2] that Plaintiff made in his July motion relate to the requirements of the PI. Those are claims 1 and 2 dealing with physical law library access and paper and pen. Claims 3-7 do not fall within the parameters of the PI, thus Defendants cannot be held in contempt for this conduct, assuming *arguendo* the legitimacy of those claims. However, the Court notes that the PI in this case does not necessarily encompass the full range of benefits or services that Plaintiff is entitled

---

[2] Plaintiff's claim regarding the deduction of funds from his prison account also does not fall within the parameters of the PI. The PI merely provides that, if indigent, Plaintiff is still entitled to receive pen and paper at State expense.

to as part of his constitutional right of access to the courts.[3]

Plaintiff claims that he was denied adequate law library access in June 1990. The Court finds that Defendants substantially complied with the PI under the circumstances.[4] The High Security law librarian abruptly left on May 31 without notice on a medical emergency, leaving a shortage of staff to man the library. Nonetheless, Plaintiff was still allowed access when no staff was available in an attempt to comply with the PI. Defendants let Plaintiff use the library while it was unattended on June 26 even though such procedure was contrary to prison rules.

In addition, Plaintiff missed some library time because he was sent to special holding due to his own misconduct. Halawa's policy of not mixing inmates from different modules has a reasonable penological objective (e.g., prevents flow of contraband and reduces inmate violence) and the fact that it prevented Plaintiff from following his normal routine did not violate the PI. There is also evidence that Plaintiff did not submit a timely request for library access for the week of June 11. It is not

---

[3] *See Bounds v. Smith*, 430 U.S. 817 (1977). Plaintiff would be entitled at state expense to "paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them." *Id.* at 824-25. Arguably, constitutional access also would require envelopes in which to send the documents.

[4] Judge Kay's June 4, 1990 Order regarding Plaintiff's April letter suggests that certain security or administration concerns may prevent Plaintiff from receiving the usual amount of law library time provided under normal circumstances.

unreasonable to require strict adherence to scheduling procedures and to prohibit late filers from causing havoc with the already administratively difficult task of scheduling all inmates enough law library time.

As to paper and pen, Plaintiff admittedly did not receive these items throughout May and early June 1990. This lapse is said to have been inadvertent and was corrected after the commissary clerk was informed of the problem. However, there is evidence that Plaintiff failed to request pen and paper in this time period. According to Unit Team Manager Shelley Nobriga, Plaintiff filed 11 store requests in May and 23 requests in June, only once did he ask for pen and paper and it was provided the next day.

In addition, Nobriga stated that Plaintiff filed 3 grievances in that time period, none of which complained of the lack of pen and paper. There is also evidence that emergency supplies were available upon request to Cinda Sandin (Residency Section Supervisor), but that Plaintiff made no such request. Under these circumstances, it cannot be said that Defendants failed to comply with the PI.

Plaintiff filed a Reply and Order to Show Cause on October 2, 1990. He continues to ask the Court to intervene on his behalf without providing the Court with *facts* to back up his claims. Instead, Plaintiff reportedly has a cache of incriminating documents stored in his cell and awaits an opportunity to personally produce them to the Court. He fears that if Defendants get a hold of them the documents will disappear. Plaintiff also believes that he can elicit favorable support by cross-examining the State's witnesses if a hearing were to be held.

It is significant that Plaintiff has not controverted any of the facts presented in Defendant's response to his motion. He offers no affidavits or documentary evidence. Mere allegations alone are not sufficient for this Court to recommend that a hearing be held on this matter. If Plaintiff has proof to support his claims, he must produce it *prior* to any hearing. As it now stands, Plaintiff is nowhere close to the "clear and convincing" evidence he needs to support his motion to hold Defendants in contempt. In addition, the Court finds that Defendants have taken reasonable steps to comply with the PI in good faith and have, in fact, substantially complied with its terms.

It is therefore recommended that Plaintiff's Order to Show Cause why the Defendants should not be held in Contempt of Judge Kay's December 1988 PI (filed July 13, 1990) and Plaintiff's Motion for Shortening of Time for a Hearing on the Order to Show Cause (filed October 2, 1990) should be DENIED.

DATED: Honolulu, Hawaii, Jan. 31, 1991 .

/s/ Bert S. Tokairin
Bert S. Tokairin
U.S. MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
[Caption Omitted In Printing]

REPORT AND RECOMMENDATION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed May 21, 1991)

I. STATEMENT OF THE CASE

The original complaint was filed herein on March 14, 1988. By Order dated May 26, 1989, Plaintiff was given leave to file an amended complaint which was filed on September 8, 1989. The named Defendants are: Theodore Sakai, William Oku, Cinda Sandin, State of Hawaii, Harold Falk, Laurence Shohet, Leonard Gonsalves, Kim Thorburn, Frances Sequeira, William Sumners, Robert Johnson, Gordon Furtado, Abraham Lota, Edward Marshal, William Paaga and Brian Lee.

The purported gist of the amended complaint appears to be that: Plaintiff's placement at and within the Halawa High Security Facility, i.e. Plaintiff's so-called "behavior modification program," violates his Fourteenth Amendment due process rights and the Eighth Amendment prohibition against cruel and unusual punishment; security measures such as the use of mechanical restraints, strip searches and prohibitions against unauthorized inmate communications violate his Fourth and Eighth Amendment rights; and various Defendants have engaged in retaliatory acts against him in violation of his unspecified rights.

Defendants filed a motion for summary judgment on November 20, 1989. By order dated November 27, 1989, Plaintiff was directed to respond to Defendants' motion by January 2, 1990, and accordingly filed his Opposition to Defendants' Motion for Summary Judgment with Cross Motion for Summary Judgment (hereinafter "Opposition") on or about December 26, 1990. Thereafter, Defendants submitted a rebuttal memorandum on January 24, 1990, and Plaintiff filed a surrebuttal memorandum on or about February 28, 1990.

In his Opposition, Plaintiff "concedes" his claims with respect to mechanical restraints, strip searches and the right to rehabilitation. Opposition pp. 17 and 19. The remaining issues before the Court are:

1. Plaintiff's allegations that his placement and classification violate his due process rights and his Eighth Amendment rights;
2. Plaintiff's allegations concerning "the arbitrary infringement on . . . [his] right to freedom of communication, religion and expression";
3. Plaintiff's allegations concerning retaliation.

II. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c).

As recently explained by the Supreme, summary judgment must be granted against a party who fails to show facts to establish an element essential to his case and on which he will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party need not disprove the claims of his opponent but need only point out why he or she believes he is entitled to summary judgment. *Id.* at 323, 325. Of course, in evaluating the evidence submitted by moving and nonmoving parties, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Electrical Services v. Pacific Electrical Contractors Assn.*, 809 F.2d 626, 630-31 (9th Cir. 1987).

III. FACTS

Plaintiff has been convicted of multiple violent crimes including attempted murder, kidnapping, burglary, robbery and rape. He has been sentenced to life imprisonment and his minimum term has been set at 30 years, which includes a 5-year consecutive sentence for escape.

While incarcerated, he has committed numerous misconducts involving assaults or attempted assaults on other inmates and staff, as well as misconducts involving threats to, interference with, harassment and abuse of staff.

Plaintiff has twice attempted escape. The first time resulted in his conviction for attempted escape in the second degree on April 4, 1985. The second attempt resulted in a misconduct charge on September 4, 1984. In short, given the length of his sentence and his manifest predilection for violence, Plaintiff appears to present the stereo typical criminal over which the State has little control or leverage.

Plaintiff is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the State's most dangerous, predatory and high risk inmates. Of necessity, the high security facility is the most restrictive prison in the state system.

Plaintiff does not dispute this. In his Opposition he admits:

> 1. Plaintiff *does not* challenge his transfer and placement 'at and within the Halawa High Security Facility,' as it is obviously apparent from Plaintiff's institutional file and from his criminal convictions that the high security facility is a proper place for inmates who pose such a threat to the community and to the prison environment.

Opposition, p. 4.

> 2. Plaintiff does not dispute Defendants' contention that "Plaintiff . . . present the stereo typical criminal" [and] "is considered a high custodial risk inmate and is incarcerated at Halawa High Security Facility which by law houses the state's most dangerous, predatory and high risk inmates." Defendants' contention in this respect cannot be disputed by Plaintiff.

Opposition, pp. 3 and 5.

IV. PLAINTIFF'S PLACEMENT DOES NOT VIOLATE HIS DUE PROCESS OR EIGHT AMENDMENT RIGHTS

A. Due Process

Plaintiff's claim that his placement at and within the various phases at the High Security Facility violates his due process rights is without merit since his placement does not affect a liberty interest subject to audit under the due process clause.

Placement of a prisoner is primarily a matter within the discretion of prison officials. As stated by the U.S. Supreme Court in *Hewitt v. Helms,* 459 U.S. 460 (1983):

> We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests. As to the first point, we have recognized that broad discretionary authority is necessary because the administration of a prison is "at best an extraordinarily difficult undertaking," *Wolff v. McDonnell, supra,* at 566, and have concluded that "to hold . . . that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." *Meachum v. Fano, supra,* at 225. As to the second point, our decisions have consistently refused to recognize more than the most basic liberty interests in prisoners. "Lawful incarceration brings about the necessary withdrawal or

> limitation of many privileges and rights, a retraction justified by the considerations underling our penal system." *Price v. Johnston*, 344 U.S. 266, 285 (1948)

459 U.S. at 467.

Inmates do not have a liberty interest in remaining in the general population of inmates or enjoying the same privileges as inmates generally. In *Hewitt v. Helms*, 459 U.S. 460 (1983) the court held that inmates had no liberty interest in being in the general population of inmates rather than in a more restricted segregation. In *Hewitt* the inmate was found not guilty of misconduct, but was required to stay in a segregated and more restrictive area for security reasons. The court held that no liberty interest was involved because the prison officials had discretion to place the inmate in any section so long as there was no cruel and unusual punishment.

Accordingly, due process requirements have not been imposed even when placement has resulted in intra- or inter-state prison transfers. *Meachum v. Fano*, 427 U.S. 215 (1976); *Montanye v. Haynes*, 427 U.S. 236 (1976); and *Olim v. Wakinekona*, 461 U.S. 238 (19830 [sic].

In Meachum the issue before the court was:

> The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a sate [sic] prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the

> concurrence of other events. We hold that it does not.

Meachum, 427 U.S. at 216.

In explaining its decision, the Court states:

> The Fourteenth Amendment prohibits any State from depriving a person of life, liberty or property without due process of law. The initial inquiry is whether the transfer of respondents . . . infringed or implicated a "liberty interest of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .
>
> Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. the Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.

> Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable that [sic] in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

Meachum, 427 at 223-225.

See also the companion case *Montanye v. Haynes*, 427 U.S. 236 (1976) where the court upheld the transfer of an inmate, without hearing, after the inmate circulated a document in disregard of applicable prison rules. The U.S. Supreme Court extended its holding in *Meachum* and *Montanye* to interstate prison transfers in *Olim v. Wakinekona*, 461 U.S. 238 (1983).

Nor does state law create a liberty interest entitling Plaintiff to due process protections. The U.S. Supreme Court in *Olim v. Wakinekona* expressly found that Hawaii's rules on classification, placement and transfer did not give rise to a state created liberty interest or otherwise implicate due process concerns.

In *Olim* an inmate raised due process challenges to his involuntary transfer to Folsom State Prison in California. The U.S. District Court for the District of Hawaii dismissed upon the basis that the Hawaii rules did not give rise to a state created interest entitled to protection

under the due process clause. The U.S. Court of Appeal for the Ninth Circuit reversed and held that the rules did create a liberty interest. On appeal to the U.S. Supreme Court, the court overruled the Ninth Circuit and expressly held that the state's rule did not give rise to a state created liberty interest because "[t]he regulation contains on standards governing the Administrator's exercise of his discretion." *Olim v. Wakinekona*, at 243. In addressing this issue the court stated:

> The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. . . .
>
> . . . [A] State creates a protected liberty interest by placing substantial limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers". . . . If the decisionmaker is not "required to base its decisions on objective and defined criteria" but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all" . . . the State has not created a constitutionally protected property interest.

Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi*, 63 Haw. at 144-145, . . . the prison Administrator's discretion . . . is completely unfettered. No standards govern or restrict the Administrator's

> determination. . . . [T]he Administrator is the only decisionmaker under Rule IV. . . .

Olim v. Wakinekona, 461 U.S. at 248-249.

Rule IV has been succeeded by section 17-201-1, 17-201-2, 17-201-22, 17-201-23 and 17-201-24 of the State of Hawaii Administrative Rules. The present rules are substantially similar to their precursor, Rule IV. The present rules do not restrict the administrator's discretion any more than did Rule IV.

B. Cruel And Unusual Punishment

Plaintiff's placement at and within the High Security Facility *per se* does not constitute cruel and unusual punishment. Plaintiff's placement is and was not punitive in nature. It does not result from a specific act of wrongdoing but from a general evaluation of Plaintiff's conduct and behavior. Although it was addressing the issue of punishment with respect to pretrial detainees, the U.S. Supreme Court in *Bell v. Wolfish*, 441 U.S. 520 (1979) stated that "not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Id.* at 441 U.S. at 537. In order for a sanction to be considered punishment, punitive intent must b [sic] shown. "[If a particular condition or restriction of pretrial detention is reasonably related to a legitimate government objective, it does not, . . . amount to punishment." *Id.* 441 U.S. at 539. The court expressly recognized that "maintaining institutional security and preserving social order and discipline are essential goals that may require limitation or retraction of the retained constitutional

rights of both convicted prisoners and pretrial detainees. *Bell*, 441 U.S. at 546.

Accordingly, Plaintiff's complaint that his placement violated his rights to due process and his Eighth Amendment rights is without merit.

V. THE STRIP SEARCHES, MECHANICAL RESTRAINTS AND PROHIBITION OF UNAUTHORIZED INMATE COMMUNICATION ARE VALID SECURITY MEASURES

Although the court must play an important role in ensuring that government officials act pursuant to law, the court should not interfere with matters within the discretion of those who operate the State's prison system. In *O'Lone v. Estate of Shabazz*, 482 U.S. ___, 107 S. Ct. 2400, 2407, 96 L. Ed. 2d 282, 293 (1987) the court stated:

> We take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to "substitute our judgment on . . . difficult and sensitive matters of institutional administration," *Block v. Rutherford*, 468 U.S. 576, 588, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984), for the determinations of those charged with the formidable task of running a prison.

In *Turner v. Safley*, 482 U.S. ___, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64, 77 (1987) the court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

Assuming *arguendo* that any of the complained of policies infringe on Plaintiff's constitutional rights, nonetheless they are valid under *Turner v. Safley*. This is patently true of the policies at issue here, which concern classification and placement of inmates, discussed *infra*, use of mechanical restraints, strip searches, and prohibition of unauthorized inmate communication in foreign language. These are clearly related to valid penological goals and are not unreasonable.

A. Unauthorized Inmate Communication In Foreign Language

In two unrelated incidents, Plaintiff was found guilty of disobeying an order to stop communicating with another inmate in a foreign language. Plaintiff claims that any prohibition against communicating in a foreign language violates his First Amendment rights.

The Supreme Court has stated that the First Amendment rights of a prisoner may be validly regulated in the infringement is reasonably related to a legitimate penological goals. In determining whether regulations are valid under the Constitution, courts are directed to consider: 1) whether the regulation has a logical connection to the legitimate government interest invoked to justify it; 2) whether there are alternative means of exercising the right that remain open to the inmates; 3) the impact accommodation of the asserted constitutional right would have on other inmates, guards, and prison resources; and 4) the presence or absence of ready alternatives that fully accommodate the prisoners' rights at *de minimis* cost to valid penological interests. *McCabe v. Arave*, 827 F.2d 634

(9th Cir. 1987); *citing Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

The prohibition against English speaking inmates communicating in languages other than English has a logical connection to a legitimate government interest. The interest is to maintain internal prison security by preventing the entry of contraband, checking for rumors or plans of escape, extortion or of fights within the facility. To allow Plaintiff to continue to communicate with other inmates in a foreign language would have a considerable impact on internal prison security, which in turn would affect the inmates, guards, and prison resources.

B. Strip Searches

In his opposition at page 17, Plaintiff concedes his claims that visual strip violates his Fourth Amendment rights. It is doubtful that Fourth Amendment rights survive conviction and incarceration. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the court said:

> [a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to insure institutional security and internal order. We are satisfied that society would insist that the prisoners expectation of privacy always yield to what must be considered the paramount interest in institutional security.

468 U.S. 527-28. Although *Hudson* involved cell searches, federal appellate courts dealing with strip searches of convicts have been equally reluctant to find any Fourth

Amendment right. *See, Goff v. Nix,* 803 F.2d 358 (8th Cir. 1986).

In *Hay v. Waldron,* 834 F.2d 481 (5th Cir. 1987) the court dealt with the constitutionality of a strip search policy virtually identical to the one at issue here. The Texas Department of Corrections strip searched inmates any time they left or entered their cells. Applying the balancing test set forth in *Bell,* the Fifth Circuit rejected the claim that searches should only be conducted upon cause noting:

> In the case before us, the strip search policy evolved in response to the rising tide of violence which flooded Texas prison systems in the recent past . . . the record contains substantial evidence that the strip search policy reasonably relates to legitimate penological objectives. We find no evidence that the strip search procedure is an exaggerated response by prison officials to conditions within the prison system.

834 F.2d at 486. Similarly, in *Goff, supra,* the Eighth Circuit faced a civil rights action brought by inmates seeking to invalidate a policy of conducting strip searches any time they moved outside their living unit. The court found these blanket searches did not violate any Fourth Amendment right which inmates *might* have.

> Against the legitimate and weighty concerns on the part of ISP administrators rests the invasion of the inmates' personal rights. While VBC strip searches admittedly are intrusive and unpleasant, a prison inmate has a far lower expectation of privacy than do most other individuals in our society.

803 F.2d at 365. Recently, the Ninth Circuit jointed this line of reasoning in *Rickman v. Avaniti,* 854 F.2d 327 (9th Cir. 1988). *Rickman* involved an Arizona prison policy requiring prisoners in the administrative segregation unit to submit to visual strip and body cavity searches when leaving their cells. Administrative segregation is the highest custody status accorded high custodial risk inmates under Arizona's system. Applying the analysis of *Bell v. Wolfish,* the Ninth Circuit found such routine visual searches to be reasonable and constitutional. *See also, Campbell v. Miller,* 787 F.2d 217 (7th Cir. 1986); *Arruda v. Fair,* 710 F.2d 886 (1st Cir. 1983).

C. Mechanical Restraints

Plaintiff also concedes his claims with respect to the use of mechanical restraints in his opposition at page 17. Leg chains and handcuffs are used on inmates at Halawa High Security, particularly those in disciplinary segregation or phase I, not as a punishment, but because, by and large these inmates are least trustworthy and present the greatest risk of harm to staff and other inmates who would be the direct and immediate targets of their violent behavior. Neck chains, however, are not routinely employed.

The court in *Spain v. Procunier,* 600 F.2d 189 (9th Cir. 1979) found regulations that contemplated the use of handcuffs and belts routinely to be reasonable and unobjectionable. There is no evidence to support Plaintiff's nonconclusory claims that the use of handcuffs, belts and leg irons are excessive cruel and/or unusual punishment.

VI. RETALIATION

Throughout his complaint Plaintiff has vaguely and conclusorily claimed that Defendants have "retaliated" against him in violation of unspecified rights. For example, in his complaint at paragraph 41 he states that Defendant Sequeira retaliated against him when Defendant Sequeira told Plaintiff, in a grievance response, on June 23, 1987, "your behavior predicates advancement to Module 'B'." (According to Plaintiff, he had "held a virtual positive behavior since his arrival to HHSF in September 3, 1985." This of course is not true. However, Plaintiff does not dispute that he pleaded guilty to assaulting another inmate on January 1, 1987.) See also paragraph 52 where Defendant Gonsalves is accused of violating Plaintiff's "rights" by telling him he is a "chronic complainer."

Plaintiff's claims of retaliation are unsupported and seem for the most part to stem or relate to various adjustment committee proceedings. There is no evidence to show any retaliatory intent on the part of any Defendant. Even if any defendant were so motivated, all incidents of misconduct are investigated and referred to an independent committee which determines whether or not any infraction occurred thereby protecting against any such motivation.

In any event, Plaintiff fails to set forth any fact and to meet his burden under *Celotex*. Nowhere in his Opposition or Surrebuttal Memorandum does he set forth any factual support for his claims of retaliation. Plaintiff appears to rely on Rule 56(f) to avoid Defendants' motion for summary judgment on this issue. However, Plaintiff is not entitled to relief under Rule 56(f), Federal Rules of

Civil Procedure. In order to withstand a motion for summary judgment under Rule 56(f), Plaintiff must show what material facts he seeks to obtain; why they are exclusively known to the other party and what steps Plaintiff has taken to obtain those facts. 10 A.C. Wright, D. Miller & M. Kane *Federal Practice and Procedure* § 2641 at 549; *Klingele v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988).

Plaintiff has failed to make any such showing. Since Plaintiff is claiming that Defendants retaliated against him, it is not unreasonable to require that he set forth the specific facts surrounding each instance of claimed retaliation.

VII. MISCELLANEOUS GRIPES

A. Exercise

Plaintiff complains that while confined in either disciplinary segregation or Phase I he was subjected to "inadequate exercise and recreation" and that he was confined for at least 22 hours a day. Prisoners have a right to reasonable opportunities for regular exercise and recreation. However, what constitutes a "reasonable opportunity" varies with the status of the prisoner. *Laaman v. Helgmos*, 437 F. Supp. 269, 269 (D. N.H. 1977) whether a particular amount of exercise is required depends on whether such amount of exercise time can be provided safely and practically. *Inmates of B Block v. Jeffes*, 470 A.2d 176 (Pa. Cmmw. 1983), *affirmed* 475 A.2d 743 (Pa. 1984). Generally this means outdoor recreation, although courts have recognized that circumstances at individual penal facilities may render outdoor exercise and recreation not feasible. *Parnell v. Waldrep*, 511 F. Supp. 764 (D. N.C.

1981), and outdoor exercise may be denied due to inclement weather, unusual circumstances, or disciplinary needs. *Spain v. Procunier,* 600 F.2d 189 (9th Cir. 1979).

The policy at HHSF is that all inmates received five hours of outdoor recreation per week, one hour per day on each weekday. Exercise is not provided on weekends. This comports with the Ninth Circuit's holding relating to amount of exercise time in *Spain v. Procunier, supra.*

Defendants' decision to limit outdoor exercise to five hours per week is based on sound administrative considerations, as well as valid penological objectives. For obvious security reasons, when an inmate is in disciplinary segregation or Phase I, they go to the recreation area alone. Further, as there are normally eight inmates housed in the special holding area, it would be difficult to permit each inmate more than one hour of recreation per day without straining limited security resources.

B. Form 106

Plaintiff complains about the use of a Form 106 Minor Conduct Form. This form is used to record observations by ACO's of inmate behavior and is a warning. Contrary to Conner's claim, no due process is required in connection with the use of this form. Form 106's do not, in and of themselves, result in the imposition of disciplinary sanctions. A collection of unfavorable 106's may trigger disciplinary proceedings, but if this occurs, the inmate is accorded all due process required in connection with such proceedings.

C. Plaintiff Has No Right To Rehabilitation

Plaintiff also concedes that he has no right to rehabilitation at page 19 of his opposition. While rehabilitation is an important penological goal, *Pell v. Procunier,* 417 U.S. 817, nonetheless inmates have no constitutional right to treatment, *Neuman v. Alabama,* 559 F.2d 283 (5th Cir. 1977); *French v. Heyne,* 547 F.2d 994 (7th Cir. 1976); *McCray v. Sullivan,* 509 F.2d 1332 (5th Cir. ___); *Feidericks v. Huggins,* 711 F.2d 31 (4th Cir. 1983); *Peck v. South Dakota Penitentiary Employees,* 332 N.W.2d 714 (S.D. 1983); and *Lovell v Brennan,* 5566 [sic] F. Supp. 672 (D. Me. 1983); aff'd 728 F.2d 560 (1st Cir. 1984).

Further Plaintiff has no sate [sic] created interest in rehabilitation. State statute § 353-7, Hawaii Revised Statutes, sets forth no specific procedures or guidelines and therefore does not create such an interest. *Toussant v. McCarthy,* 801 F.2d 1080. The cases cited by Plaintiff are to be distinguished on this basis or on the basis that they arose in the context of "totality of conditions" type lawsuits, see e.g. *Palmigiano v. Garrahy,* 443 F. Supp. 956 or *Pugh v. Locke,* 406b [sic] F. Supp. 318 (a type of lawsuit expressly disapproved by the Ninth Circuit in *Hoptowit v. Ray,* 682 F.2d 1237 (1988)). As conceded by Plaintiff, inmates in Modules B and C are allowed training and assignments on workline. Only those inmates in disciplinary segregation and phase I are precluded from such privileges.

D. Invalid Rule

In his opposition Plaintiff, for the first time, challenges the operation of the facility on the basis that the manner in which it is run is a "rule" under state law

which was not adopted pursuant to the Hawaii Administrative Procedures Act, Hapa; Chapter 91, Hawaii Revised Statutes.

As noted by Defendants, Plaintiff misleadingly and incompletely quotes the definition of "rule" in support of this contention. Opposition, pp. 7 and 8. In its entirety, "Rule" is defined in Haw. Rev. State. [sic] §91-1(4) (1985) as follows:

> "Rule" means each agency statement of general or particular applicability and future that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. *The term does not include regulations concerning only the internal management of an agency* and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda. (Emphasis added)

Since the prison serves as the detention place for inmates committed to the custody of the Director of Corrections as a result of their criminal convictions, any policy concerning the operation and management of the prison may be said to impact on the inmates. Nonetheless, notwithstanding such impacts, regulations concerning the operation and management of the prison are generally matters of "internal management" and not rules, e.g., *Tai v. Chang*, 58 Haw. 386, 570 P.2d 563 (1977); *Holdman v. Olim*, 59 Haw. 346, 581 P.2d 1164 (1978), particularly when such regulations concerning the custodial management of public property entrusted to the agency, e.g., *Holdman v. Olim*, 59 Haw. 346, 581 P.2d 1164 (1978) *Ah Ho v. Cobb*, 62 Haw. 632, 673 P.2d 1030 (1983).

In *Tai v. Chang*, the inmate filed a petition for habeas corpus to challenge the legality of his transfer to an out-of-state prison on the basis, *inter alia*, that it was pursuant to an unpublished rule. Although the Court's decision was based in part on Haw. Rev. Stat. §353-3 (1976) (repealed 1987), the Hawaii Supreme Court also based its decision upon the separate ground that:

> Under HAPA, however, the term rule is defined to exclude "regulations concerning only the internal management of an agency." HRS § 91-1(4). The legislative history of HAPA discloses that policy decisions regarding state penal institutions were considered to be regulations that involved only the internal management of these institutions. In commenting on the definition of rule as used in HAPA, the Standing Committee Report No. 8, 1961 Hawaii House Journal 656, stated:
>
> It is intended by this definition of "rule" that regulations and policy prescribed and used by an agency principally directed to its staff and its operations are excluded from the definition. In this connection your Committee considers *matters relating to the operation and management* of state and county penal . . . institutions . . . *(to be) primarily a matter of "internal management"* (and excluded from) this definition.

Tai v. Chang, 58 Haw. at 387, 570 P.2d at 564 (emphasis added).

Accordingly Plaintiff challenge would appear to be without merit. Moreover it would appear that this issue is not one that may be appropriately resolved by this Court. The Federal Court does not have the jurisdiction to

enforce a State law or rule unless a Federal right is being violated. *Bates v. Sponberg*, 547 F.2d 325 (6th Cir. 1976).

E. Adequate Medical And Dental Care; Psychological And Psychiatric Examinations

Plaintiff in his complaint alleges that Defendants "discriminate against Plaintiff and *all* inmates on phase one and disciplinary segregation for access to adequate medical and dental care," and further, that "Defendants deny Plaintiff psychological and psychiatric examinations." Amended Complaint, Par. 30 and 32. Plaintiff, however, fails to support these conclusory allegations with any factual showing of discrimination or of discriminatory intentions by any of the Defendants (*Gutierez v. Municipal Court of SE Judicial District*, 838 F.2d 1031 (9th Cir. 1988)) or of any deliberate indifference to his serious medical needs. (*Estelle v. Gamble*, 429 U.S. 97 (1976)). In the absence of such showing, Plaintiff's complaint fails to rise to the level of a constitutional claim and Plaintiff further fails to show why any of the Defendants may be held liable.

F. Inadequate Lighting And Cell Furniture

Plaintiff claims that inadequate lighting, the lack of desk and chair, lack of a removable bed frame and having his food tray which is wrapped in saran wrap, and placed on the floor are cruel and unusual punishments. Plaintiff, however, fails to cite to any authority supporting the proposition that in the context of a maximum security facility, such admittedly spartan conditions are cruel and

unusual punishments. See, *Adams v. Kincheloe*, 743 F. Supp. 1385 (ED Wash. 1990) holding that food dropped on floor without eating utensils or tray was not cruel and unusual punishment. Even assuming *arguendo* that Plaintiff has some constitutional right with respect to "adequate" lighting, desk, chair and removable bed frame, such rights could not be absolute, but are subject to the limitations expressed in *Turner v. Safely*. Given Plaintiff's concessions as to both the appropriateness of Plaintiff's placement at the High Security Facility and as to the nature of the population of inmates at the High Security Facility, the spartan conditions of Plaintiff's confinement appear reasonably related to the prison's patent security concerns. Affidavit of Cinda Sandin, paragraph 10, attached to Defendants' Motion for Summary Judgment. In any event, Plaintiff fails to indicate which, if any, of the Defendants actually caused his claimed injury so as to be liable under *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). As discussed in greater detail, *supra*, Defendants' nexus with these matters seems to stem solely from their official capacities and accordingly they are protected by sovereign immunity. See *Pembaur v. City of Cincinnati*, 475 U.S. 468, 483 (1986).

G. First Amendment Claims

Plaintiff also alleges diverse First Amendment violations. ("Defendants deny Plaintiff to receive pictures, brochures, newspaper clippings, religious materials and crossword puzzles . . . and instead only permit him to have letters. . . . "; "Defendants deny Plaintiff religious

counseling while in phase one and disciplinary segregation"; and "Defendants deny Plaintiff his right to freedom of expression and association by imposing a publisher only rule." Amended Complaint, pars. 29 and 31.)

Again, Plaintiff fails to set forth any authority supporting the existence of alleged constitutional rights, e.g., pictures, brochures, newspaper clippings and puzzles. Plaintiff also fails to set forth any factual substantiation that he suffered any injury, or that Defendants actually caused such injury and are therefore liable. For example, with respect to the "publisher only rule" Plaintiff does not specify what it is or how or if he suffered actual injury. Plaintiff does not controvert Defendants' statement that an "inmate may order approved books through the library or from a publisher. They may be hard bound and are not required to be donated to the library. Inmates regularly subscribe to a variety of magazines." Affidavit of Cinda Sandin, par. 13. Plaintiff further does not specify any instance when he was adversely affected by the foregoing.

Plaintiff has made other unsubstantiated and apparently conflicting allegations. (See e.g. Amended Complaint, paragraph 34: "Defendants subject Plaintiff to double celling in module "A" which one person must sleep on the floor" – notably there is no allegation that Plaintiff in fact slept on the floor; paragraph L, page 14: "Defendants subjected plaintiff to double celling"; and compare with claim C: "Defendants subjected plaintiff to punitive isolation.")

In reviewing all of Plaintiff's unsubstantiated allegations, they are noticeably lacking in any claim of personal

injury. It is exceedingly clear that Plaintiff's complaint is with the restrictive rules that he must abide by. It is also clear that Defendants are named in this suit only in their official capacities. Plaintiff makes this crystal clear on page 12 of his amended complaint under the section entitled "Official responsibilities" where Plaintiff states that essentially the basis of his claims against the administrative defendants arise from their nexus with the rules Plaintiff is protesting. This conclusion is bolstered by Plaintiff's statement of his claims on page 13 of the Amended Complaint. See, e.g. paragraphs (A), (B), (C), (E), (G), (I), (J), (N) and (O) which premise liability on the programs, rules and policies at Halawa High Security Facility. Sovereign immunity precludes any monetary award.

VIII. THE NAMED DEFENDANTS ARE PROTECTED FROM LIABILITY BY SOVEREIGN IMMUNITY

In essence all of Plaintiff's claims are against Defendants in their official capacities and this entire proceeding should be dismissed accordingly. The State of Hawaii enjoys sovereign immunity in claims brought under section 1983 because it has not waived its Eleventh Amendment immunity, nor has Congress overridden that immunity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Where the claims are against state officials in their official capacities, the state officials are protected by the same sovereign immunity as the state. *Id.* The U.S. Supreme Court has reaffirmed that neither the state nor state officials are persons under section 1983. *Will v. Michigan Department of State Police, et al.*, 109 S. Ct. 2304 (1989).

Official capacity suits generally represent another way of pleading an action against an entity of which the officer is an agent. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978). Where the officials are acting pursuant to policy, the government agency is the party responsible for their actions. *Pembaur v. City of Cincinnati*, 475 U.S. 468, 483 (1986). In *Hutto v. Finney*, 437 U.S. 678, 699 (1978) the court held that a case challenging the conditions at the state prisons in Arkansas was a suit against the prison officials in their official capacities.

Plaintiff's claims are in substance directed at departmental policies. There is no credible showing that any Defendant went beyond the scope of his authority or disregarded the policies. Further there is no showing of personal involvement by the named Defendants who appear to be Defendants only because they were administrators. Since the claims for damages in the complaints are against Defendants in their official capacities, the entire complaint should be dismissed.

IX. THE NAMED DEFENDANTS ARE ALSO PROTECTED BY QUALIFIED IMMUNITY

Even if some claims are against Defendants in their individual capacities, Defendants are immune from liability for damages because of qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court held that certain government officials have a qualified immunity from liability. The immunity is available unless the official knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the

Plaintiff, or unless he took the action with the malicious intent to cause a deprivation of constitutional rights or injury. *Id.* at 815. Qualified immunity extends to prison officials. *Procunier v. Navarette*, 434 U.S. 555 (1978).

In *Anderson v. Creighton*, 483 U.S. ___, 107 S. Ct. 3034, 97 L. Ed. 523 (1987), the court clarified its view on qualified immunity by stating that the trial court must answer the objective question of whether a reasonable public official could have believed he was violating a clearly established right of the Plaintiff. The court stated that in order for an individual defendant exercising discretion to be held liable, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* 107 S. Ct. at 3039, 97 L. Ed. at 531.

Plaintiff has failed to show any act by the individual Defendants which violated his constitutional rights. In fact the claims raised in the complaint do not show any violation of Plaintiff's constitutional rights.

X. PLAINTIFF HAS FAILED TO SHOW THAT THE NAMED DEFENDANTS ACTUALLY CAUSED HIM ANY CONSTITUTIONAL DEPRIVATIONS

It is incumbent upon Plaintiff to show that each Defendant actually caused the constitutional deprivation he claims to have suffered. He has failed to do this. "A person deprives another 'of a constitutional right, within the meaning of section 1983, if he does an *affirmative* act, participates in another's *affirmative* acts, or omits to perform an *act* which he is legally required to do that *causes*

the deprivation of which [the] Plaintiff complains.' *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). . . . " *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (emphasis added). Further, "[t]he inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Id.* at 633. Administrative defendants cannot be held liable on the basis of *respondeat superior*. That doctrine does not apply in section 1983 cases. *Monell, supra*, at 693.

Plaintiff has many grievances for which he clearly blames the named Defendants. His accusations are insufficient however. He must show the facts upon which he premises the individual liability of each Defendant. He has utterly failed to do this. The complaint should accordingly be dismissed.

XI. CONCLUSION

For the reasons stated above, it is recommended that Defendants' motion for summary judgment be granted, Plaintiff's cross motion for summary judgment be denied and the complaint be dismissed with prejudice.

DATED: Honolulu, Hawaii, May 21, 1991.

/s/ Bert S. Tokairin
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

[Caption Omitted In Printing]

OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION

(Filed June 18, 1991)

PLAINTIFF DeMONT R.D. CONNER, HEREBY OBJECTS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION.

THIS OBJECTION IS BASED ON THE FOREGOING AS WELL AS THE FILES AND RECORDS IN THIS CASE.

STANDARD OF REVIEW FOR SUMMARY JUDGEMENT

PLAINTIFF OBJECTS TO THE ONE-SIDED "SUMMARY JUDGEMENT STANDARD" FOUND ON PAGE 3 OF THE MAGISTRATES REPORT AND RECOMMENDATION (HEREINAFTER "R AND R"). THE "STANDARD" CITED BY THE MAGISTRATE IS CLEARLY TWISTED TO FAVOR GIVING THE DEFENDANTS A SWIFT VICTORY, WHICH, THE DEFENDANTS ARE NOT WHOLLY ENTITLED TO.

RULE 56(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE PROVIDES THAT SUMMARY JUDGEMENT SHALL BE ENTERED WHEN:

> . . . THE PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH THE AFFIDAVITS, IF ANY, SHOW THAT THERE IS NO GENUINE ISSUE AS TO ANY

> MATERIAL FACT AND THAT THE MOVING PARTY IS ENTITLED TO A JUDGEMENT AS A MATTER OF LAW.

THE MOVING PARTY HAS THE INITIAL BURDEN OF "IDENTIFYING FOR THE COURT THOSE PORTIONS OF THE MATERIALS ON FILE IN THE CASE THAT IT BELIEVES DEMONSTRATE THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT." *T.W. ELECTRICAL SERVICE, INC. V. PACIFIC ELECTRICAL CONTRACTORS ASS'N*, 809 F.2D 626, 630 (9TH CIR. 1987), *CITING CELOTEX CORP. VS. CATRETT*, 477 U.S. 317, 323, 106 S.CT. 2548, 2553 (1986). THE MOVANT MUST BE ABLE TO SHOW "THE ABSENCE OF A MATERIAL AND TRIABLE ISSUE OF FACT," *RICHARDS VS. NEILSEN FREIGHT LINES*, 810 F.2D 898, 902 (9TH CIR. 1987), ALTHOUGH IT NEED NOT NECESSARILY ADVANCE AFFIDAVITS OR SIMILAR MATERIALS TO NEGATE THE EXISTENCE OF AN ISSUE ON WHICH THE NON-MOVING PARTY WILL BEAR THE BURDEN OF PROOF AT TRIAL. *CAL. ARCH. BLDG. PROD. V. FRANCISCAN CERAMICS*, 818 F.2D 1466, 1468 (9TH CIR. 1987), *CERT. DENIED*, 108 S.CT. 698 (1988). *SEE, CELOTEX*, 477 U.S. AT 325, 106 S.CT. AT 2553. *BUT CF. ID.*, AT 328, 106 S.CT. AT 2555-56 (WHITE, J., CONCURRING).

WILDER VS. TANOUYE, 753 P.2D 816 (1988 HAW.APP.) IS A CASE THAT COMES CLOSEST TO CIRCUMSTANCES IN THE CASE-AT-BAR. *WILDER*, SUPRA, CHALLENGED A "DIRECTIVE" THAT PERTAINED *ONLY* TO AN INDIVIDUAL HOUSING UNIT *WITHIN A FACILITY*. THUS, THE COURT IN *WILDER*, HELD THAT, [IN THE CONTEXT OF INSTITUTIONS]

"RULE" WITHIN THE MEANING OF RELEVANT STATUTES *APPLIES* TO "RULES" THAT GOVERN A FACILITY *AND NOT* TO RULES THAT GOVERN ONLY A PARTICULAR HOUSING UNIT OF A FACILITY.

THEREFORE, AS IS EXPLICITLY UNDERSTANDABLY CLEAR FROM THE RULING IN *WILDER*, § 17-200-1 OF TITLE 17 ADMINISTRATIVE RULES OF THE CORRECTIONS DIVISION (TITLE 17) GOVERNS THE *ADOPTION* OF RULES RELATING TO INDIVIDUAL FACILITIES. TITLE 17 § 17-200-1 SPECIFICALLY STATE [sic]:

> (A) THIS SUBTITLE SHALL GOVERN THE CORRECTIONS DIVISION OF THE DEPARTMENT [OF PUBLIC SAFETY], STATE OF HAWAII, EACH INDIVIDUAL FACILITY MAY ADOPT RULES GOVERNING ITS UNIQUE SITUATION PURSUANT TO CHAPTER 353, SUBJECT TO THE APPROVAL OF THE DIRECTOR OF THE DEPARTMENT [OF PUBLIC SAFETY] AND THE GOVERNOR. HOWEVER, SUPERSESSION OF THESE RULES SHALL BE PERMITTED ONLY WHERE NECESSARY DUE TO THE UNIQUE CHARACTERISTICS OF THE FACILITY.

THUS, TITLE 17 LEFT IT UP TO THE DISCRETION OF THE INDIVIDUAL FACILITIES THAT THEY *"MAY"* CHOOSE TO ADOPT "RULES" GOVERNING ITS UNIQUE SITUATION. THEY DON'T HAVE TO ADOPT SUCH "RULES", BUT, IF AN INDIVIDUAL FACILITY ELECTS TO ADOPT "RULES" THAT GOVERN ITS UNIQUE SITUATION, SUCH "RULES" SHALL BE MADE PURSUANT TO CHAPTER 353 (HAWAII REVISED STATUTES) *AND* SUBJECT TO THE

APPROVAL OF THE DIRECTOR *AND* THE GOVERNOR. *SEE* EXHIBIT "D" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT.

HAW. REV. STAT. § 353-3 ALSO REQUIRES THAT IF THE DIRECTOR ELECTS TO MAKE "RULES" TO GOVERN *ALL* FACILITIES IN THE STATE IT MUST DO SO WITH THE APPROVAL OF THE GOVERNOR. *SEE* EXHIBIT "C" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. SEE ALSO "CROSS REFERENCES" SECTION OF HAW. REV. STAT. § 353-3, EXHIBIT "C", WHERE IT CITES: "RULEMAKING, *SEE* CHAPTER 91.

INDEED, THE DIRECTOR OF THE [DEPARTMENT OF PUBLIC SAFETY] DID IN FACT SEEK AND GOTTEN [sic] THE APPROVAL OF THE GOVENOR [sic] WHEN IT CHOSE TO MAKE "TITLE 17". TITLE 17 IS APPROVED BY THE GOVERNOR OF THE STATE OF HAWAII. PLAINTIFF CONTENDS THAT IF THE DIRECT IS BOUND BY LAWS THAT GOVERN HIM IN THE PROMULGATION OF "RULES", THEN SO IS DEFENDANTS OKU, AND, SHOHET. TITLE 17 § 17-200-1 GOVERNS THESE DEFENDANTS.

THEREFORE, WHEN DEFENDANTS OKU AND SHOHET MADE THE S.M.C.P. THEY DID SO WITHOUT THE APPROVAL OF THE GOVERNOR AND THE DIRECTOR. THUS, THEY ACTED CONTRARY TO CLEARLY ESTABLISHED LAWS AND RULES AND REGULATIONS. DEFENDANT SHOHET ADMITTED IN AN AFFIDAVIT THAT WHEN THE S.M.C.P. AND ITS POLICIES AND PROCEDURES WERE MADE, IT WAS ONLY

APPROVED BY DEFENDANT OKU AND A MS. EDITH WILHELM WHO WAS MERELY AN ASSISTANT ADMINISTRATOR IN THE CORRECTIONS DIVISION. *SEE* PAGE 3 OF EXHIBIT "E" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT.

IN *SIMS VS. FALK, ET AL.*, CIVIL NO. *88-0348 DAE*, (JANUARY 4, 1989 U.S.D.C.-D.HAW) JUDGE EZRA ACCEPTED AS FACT THAT "DEFENDANTS DEVELOPED AND IMPLEMENTED THE [S.M.C.P.] TO CONTROL THE BEHAVIOR OF *HIGH SECURITY FACILITY INMATES.*" *SEE* EXHIBIT "A" ATTACHED TO PLAINTIFF'S SIRREBUTTAL MEMORANDUM FILED IN THIS CASE.

WHEREFORE, IT IS NOT DISPUTED BY THE DEFENDANTS THAT THE S.M.C.P. GOVERNS THE HIGH SECURITY FACILITY – AND NOT JUST A PARTICULAR HOUSING UNIT. IT IS ALSO INDISPUTABLE THAT THE S.M.C.P. WAS NOT APPROVED BY THE DIRECTOR OR GOVERNOR.

THEREFORE, THE ONLY ESSENTIAL QUESTIONS THAT PERVADES ARE:

1. IS THE S.M.C.P. A "RULE" AS DESCRIBED IN CHAPTER 91 OF HAPA?

2. IF SO, IS THE "RULEMAKING" PROCEDURES MANDATED IN CHAPTER 91 OF HAPA APPLICABLE TO THE HALAWA HIGH SECURITY FACILITY?

PLAINTIFF CONTENDS THAT "YES" IS THE ANSWER TO BOTH QUESTIONS. PLAINTIFF BASES HIS CONTENTION ON THE FOLLOWING POINTS:

HAPA STATES:

"RULES MEAN EACH AGENCY STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE EFFECT THAT IMPLEMENT, INTERPRETS OR PRESCRIBES LAW OR POLICY OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENT OF ANY AGENCY" . . .

(HAW.REV.STAT. § 91-1(4)

THE MAGISTRATE POINTS OUT THAT "PLAINTIFF MISLEADINGLY AND INCOMPLETELY QUOTES THE DEFINITION OF "RULE" IN SUPPORT OF HIS CONTENTION. PLAINTIFF'S "INCOMPLETE" QUOTE OF CHAPTER 91 § 91-1(4) WAS NOT DONE TO "MISLEAD"[ ] ANYONE. PLAINTIFF WAS CITING THOSE PARTS THAT HE SEES AS PERTINENT. IF THE DEFENDANTS WANT TO ARGUE THAT "THE TERM DOES NOT INCLUDE REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN ANGENCY [sic]" . . . THEN THEY – AND NOT THE MAGISTRATE – SHOULD COME FORWARD AND ARGUE THIS POINT. BUT, THEY DO NOT. INSTEAD THEY HAVE AVOIDED THE ARGUMENT UNTIL THEY FILED THEIR REBUTTAL MEMORANDUM, WHICH, EVEN THEN THEIR ARGUMENT WAS "MISLEADING" AND TWISTED.

IN ANY CASE, AS STRESSED BY PLAINTIFF THROUGHOUT HIS PLEADING'S [sic] HE DOES NOT CHALLENGE THE "REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN AGENCY". PLAINTIFF EVEN SUBMITS THE "REGULATIONS" THAT CONCERN "ONLY THE INTERNAL MANAGEMENT" OF HALAWA HIGH SECURITY

FACILITY TO SHOW THE DIFFERENCE BETWEEN THAT *AND* THE S.M.C.P. POLICIES AND PROCEDURES. *SEE* EXHIBIT "A" ATTACHED TO PLAINTIFF'S OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGEMENT. THE FIRST THREE PAGES OF EXHIBIT "A" SET FORTH THE "STATEMENT OF GENERAL OR PARTICULAR APPLICABILITY AND FUTURE THAT IMPLEMENTS, INTERPRETS, OR PRESCRIBES LAW OR POLICY, OR DESCRIBES THE ORGANIZATION, PROCEDURE, OR PRACTICE REQUIREMENTS OF" THE HIGH SECURITY FACILITY. WHEREAS, THE DOCUMENT ENTITLED "INMATE GUIDELINES" SPECIFICALLY CONCERNS "ONLY THE INTERNAL MANAGEMENT OF" THE HIGH SECURITY FACILITY. THE DIFFERENCES ARE CLEAR AND PRECISE.

NOW THAT PLAINTIFF HAS SHOWN THAT THE S.M.C.P. IS A "RULE" THAT GOVERNS THE ENTIRE FACILITY *AND NOT* JUST A PARTICULAR HOUSING UNIT WITHIN THE FACILITY I.E. EXHIBIT "A" INMATE GUIDELINES PHASE I, SUPRA THE NEXT POINT PLAINTIFF WILL SHOW IS HOW CHAPTER 91 HAPA IS APPLICABLE TO THE HIGH SECURITY FACILITY.

IF THE MOVING PARTY MEETS ITS BURDEN, THEN THE OPPOSING PARTY MAY NOT DEFEAT A MOTION FOR SUMMARY JUDGEMENT IN THE ABSENCE OF ANY SIGNIFICANT PROBATIVE EVIDENCE TENDING TO SUPPORT HIS LEGAL THEORY. COMMODITY *FUTURES TRADING COMM'N VS. SAVAGE*, 611 F.2D 270, 282 (9TH CIR. 1979). THE OPPOSING PARTY CANNOT STAND ON HIS PLEADINGS, NOR CAN HE SIMPLY ASSERT THAT HE WILL BE ABLE TO

DISCREDIT THE MOVANT'S EVIDENCE AT TRIAL. *SEE T.W. ELECTRICAL*, 809 F.2D AT 630. SIMILARLY, LEGAL MEMORANDA AND ORAL ARGUMENT ARE NOT EVIDENCE AND DO NOT CREATE ISSUES OF FACT CAPABLE OF DEFEATING AN OTHERWISE VALID MOTION FOR SUMMARY JUDGEMENT. *BRITISH AIRWAYS BD. VS. BOEING CO.*, 585 F.2D 946, 952 (9TH CIR. 1978), *CERT. DENIED* 440 U.S. 981 (1979). MOREOVER, "IF THE FACTUAL CONTEXT MAKES THE NONMOVING PARTY'S CLAIM *IMPLAUSIBLE*, THAT PARTY MUST COME FORWARD WITH MORE PERSUASIVE EVIDENCE THAN WOULD OTHERWISE BE NECESSARY TO SHOW THAT THERE IS A GENUINE ISSUE FOR TRIAL." *FRANCISCAN CERAMICS*, 818 F.2D AT 1468, *CITING MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. V. ZENITH RADIO CORP.*, 475 U.S. 574, 587, 106 S.CT. 1348, 1356 (1986).

THE STANDARD FOR A GRANT OF SUMMARY JUDGEMENT REFLECTS THE STANDARD GOVERNING THE GRANT OF A DIRECTED VERDICT. *SEE EISENBERG V. INSURANCE CO. OF NORTH AMERICA*, 815 F.2D 1285, 1289, *CITING, ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242, 250, 106 S.CT. 2505, 2512 (1986). THUS, THE QUESTION IS WHETHER "REASONABLE MINDS COULD DIFFER AS TO THE IMPORT OF THE EVIDENCE." *ID.*

HOWEVER, WHEN "DIRECTED EVIDENCE" PRODUCED BY THE MOVING PARTY CONFLICTS WITH "DIRECT EVIDENCE" PRODUCED BY THE PARTY OPPOSING SUMMARY JUDGEMENT, "THE JUDGE MUST ASSUME THE TRUTH OF THE EVIDENCE SET FORTH BY THE NONMOVING PARTY WITH RESPECT

TO THAT FACT." *T.W. ELECTRICAL*, 809 F.2D AT 631. ALSO, INFERENCES FROM THE FACTS MUST BE DRAWN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY. *ID.* INFERENCES MAY BE DRAWN BOTH FROM UNDERLYING FACTS THAT ARE NOT IN DISPUTE, AS WELL AS FROM DISPUTED FACTS WHICH THE JUDGE IS REQUIRED TO RESOLVE IN FAVOR OF THE NON-MOVING PARTY. *ID.*

SEGREGATION AND MAXIMUM CONTROL PROGRAM

PLAINTIFF OBJECTS TO THE MAGISTRATE MISCONSTRUING PLAINTIFF'S CHALLENGE TO THE DEFENDANTS' SEGREGATION AND MAXIMUM CONTROL PROGRAM OR S.M.C.P. PLAINTIFF HAS NOT AND DOES NOT CHALLENGE HIS "PLACEMENT" AT AND WITHIN THE HIGH SECURITY FACILITY. THEREFORE, THIS COURT SHOULD NOT CONSIDER THE ISSUE THAT IS BEING SOLD TO THIS COURT REGARDING "PLACEMENT".

PLAINTIFF IS TALKING ABOUT TREATMENT; OF HOW THE DEFENDANTS HAVE HIM SUBJECTED TO: AN INVALID RULE WHICH IS PER SE THE S.M.C.P.; OF HOW THE DEFENDANTS SUBJECT PLAINTIFF, ARBITRARILY, TO AN [sic] BEHAVIOR MODIFICATION PROGRAM, WHICH, THEY ARE *NOT* QUALIFIED TO DESIGN *THIS TYPE* OF BEHAVIOR MODIFICATION PROGRAM; AND THAT VARIOUS ASPECTS OF THIS S.M.C.P. RUN AFOUL TO THE CONSTITUTIONAL RIGHTS OF PLAINTIFF.

THE MAGISTRATE ERRED IN CONCLUDING PLAINTIFF IS CHALLENGING HIS "PLACEMENT". THUS, THE WHOLE ARGUMENT FROM PAGE *5* TO PAGE *10* IS MISPLACED AND INAPPROPRIATE.

THE CLOSEST PART THAT PLAINTIFF FEELS THE MAGISTRATE IS APPROACHING AN ISSUE THAT PLAINTIFF PRESENTS IS THAT PART WHERE PLAINTIFF CONTENDS THAT THE S.M.C.P. IS A RULE THAT GOVERNS THE ENTIRE FACILITY, AND AS A RULE THAT GOVERNS AN ENTIRE FACILITY, SUCH "RULE" MUST BE MADE IN ACCORDANCE WITH CHAPTER 91 OF THE HAWAII ADMINISTRATIVE PROCEDURE ACT OR "HAPA". THE MAGISTRATE PRESENTS AN ARGUMENT TO THIS ISSUE ON PAGE *20* OF HIS "R AND R".

IN SECTION "*D*" THE MAGISTRATE CONTENDS THAT PLAINTIFF, "FOR THE FIRST TIME," CHALLENGES THE OPERATION OF THE FACILITY ON THE BASIS THAT THE MANNER IN WHICH IT IS RUN IS A "RULE" UNDER STATE LAW WHICH WAS NOT ADOPTED PURSUANT TO HAPA. THIS IS ABSOLUTELY UNTRUE. IN PLAINTIFF'S AMENDED COMPLAINT, THIS COURT WILL FIND THAT ON PAGE *13* UNDER "*CLAIMS*" (B) THAT HE STATES PERFECTLY CLEAR:

> "DEFENDANTS FORCED UPON PLAINTIFF THEIR BEHAVIOR MODIFICATION PROGRAM THAT WAS NOT APPROVED BY THE GOVENOR [sic] OF THE STATE OF HAWAII AS REQUIRED BY STATE LAW IN ORDER TO HAVE THE 'FORCE AND EFFECT OF LAW' IN ORDER TO BE VALID" . . .

OBVIOUSLY, THAT MAGISTRATE DID NOT READ CAREFULLY PLAINTIFF'S AMENDED COMPLAINT. INSTEAD THE MAGISTRATE MERELY REITERATE'S [sic] THE DEFENDANTS CONTENTION CITING THE SAME CASE LAW. HOWEVER, THE MAGISTRATE'S RULING ON THIS ISSUE COVERS "A HORSE OF A DIFFERENT COLOR", PAY ABSOLUTELY NO ATTENTION TO THE FACTUAL CIRCUMSTANCES SURROUNDING THIS CASE, WHICH IS SEPARATE FROM THE CASES PRESENTED IN *TAI VS. CHANG*, 570 P.2D 563 (1977); *HOLDMAN VS. OLIM*, 581 P.2D 1164 (1978); AND *AH HO VS. COBB*, 673 P.2D 1030 (1983).

TAI, SUPRA, IS A CASE THAT DEALT WITH AN *UNPUBLISHED RULE RELATING TO TRANSFER*. THE INMATE IN *TAI*, TOOK UP CHALLENGE TO REGULATIONS CONCERNING ONLY THE INTERNAL MANAGEMENT OF AN AGENCY. *HOLDMAN*, SUPRA, CHALLENGED A CORRECTIONS "DIRECTIVE". *CF. AH HO*, SUPRA.

AS CITED IN FOOTNOTE *8* IN *WILDER*, SUPRA, THE HAWAII LEGISLATURE SPECIFICALLY MANDATED THE CREATION OF A "HIGH SECURITY FACILITY. *SEE* HAW.REV.STAT. § 353-1.2 (1985). THE COURT IN *WILDER*, STATED THAT [FOR THE PURPOSES OF INSTITUTIONS] THAT A FACILITY IS AN AGENCY AS DEFINED BY CHAPTER 91 OF HAPA. THUS, AS THE S.M.C.P. IS A "RULE" WITHIN THE MEANING OF CHAPTER 91 AND THAT CHAPTER 91 [HAPA] IS APPLICABLE TO THE [HIGH SECURITY] FACILITY, CURRENT SETTLED CASE LAW – DEALING SPECIFICALLY WITH THE ISSUES PRESENTED HEREIN –

HOLDS THAT "RULES" [IN THE CONTEXT OF INSTITUTIONS] WITHIN THE MEANING OF RELEVANT STATUTES APPLY TO RULES GOVERNING A FACILITY. *WILDER*, SUPRA.

THE NEXT QUESTIONS [sic] THAT SHOULD BE RESOLVED IS EVEN ASSUMING ARGUENDO THAT THE S.M.C.P. IS AN INVALID "RULE", AS DEFINED BY STATUTES, AND ENFORCED THUS, ILLEGALLY AT THE HIGH SECURITY FACILITY, DOES PLAINTIFF HAVE A STATE-CREATED LIBERTY INTEREST IN NOT BEING SUBJECTED TO AN INVALID "RULE"?

PLAINTIFF CONTENDS THAT HE HAS A STATE-CREATED LIBERTY INTEREST IN NOT BEING SUBJECTED TO AN INVALID "RULE". THE POINTS OF PLAINTIFF'S CONTENTION THAT HE HAS A STATE-CREATED LIBERTY INTEREST ARE AS FOLLOWS:

1. CHAPTER 91 OF HAPA § 91-7(B) STATES: . . . "THE COURT SHALL DECLARE THE RULE INVALID IF IT FINDS IT VIOLATES THE CONSTITUTIONAL OR STATUTORY PROVISIONS OR EXCEEDS THE STATUTORY AUTHORITY AND WAS ADOPTED WITHOUT COMPLIANCE WITH STATUTORY RULE-MAKING PROCEDURE.";

2. TITLE 17 § 17-200-1; AND

3. CHAPTER 91 OF HAPA; AND

4. HAW.REV.STAT. 353-3.

IT IS CLEAR THAT NOT EVERY STATE STATUTE OR REGULATION CREATES A LIBERTY INTEREST. ONLY IF A STATUTE OR REGULATION LIMITS THE DISCRETION OF STATE OFFICIALS BY PROVIDING

THAT THEY "MAY" OR "MUST" TAKE SOME ACTION ONLY UNDER CERTAIN PRESCRIBED CIRCUMSTANCES DOES THE STATUTE OR REGULATION CREATE A LIBERTY INTEREST OR "ENTITLEMENT". *HEWITT VS. HELMS*, 459 U.S. 460, 466, 103 S.CT. 864, 871 (1983) ("THE REPEATED USE OF EXPLICITLY MANDATORY LANGUAGE IN CONNECTION WITH REQUIRING SPECIFIC SUBSTANTIVE PREDICATES DEMANDS A CONCLUSION THAT THE STATE HAS CREATED A PROTECTED LIBERTY INTEREST"); *TOUSSAINT VS. MCCARTHY*, 801 F.2D 1080, 1089 (9TH CIR. 1986), *CERT. DENIED*, 107 S.CT. 2462 (1987).

IN THE CASE-AT-BAR, IT IS INDISPUTABLE THAT EITHER IN COMBINATION TO EACH OTHER OR STANDING ALONE, THE FOUR POINT CITATIONS OF STATUTES AND REGULATIONS, SUPRA, SET FORTH THE PROCEDURES TO BE FOLLOWED WHEN PROMULGATING RULES. IN SHORT THE DEFENDANTS DISCRETION ARE LIMITED IN MAKING RULES GOVERNING THEIR FACILITY BY PROVIDING THAT THE RULES IS SUBJECT TO THE APPROVAL OF THE GOVERNOR *AND* DIRECTOR. *SEE* I.E. TITLE 17 § 17-200-1. THUS, PLAINTIFF CONTENDS THAT DEFENDANTS OKU AND SHOHET VIOLATED PLAINTIFF'S STATE-CREATED LIBERTY INTEREST IN BEING FREE FROM RULES THAT ARE NOT MADE IN ACCORDANCE WITH CHAPTER 91 OF HAPA E.G. RULES WHICH GOVERN A FACILITY.

FINALLY, THE MAGISTRATE CONTENDS THAT THIS ISSUE IS NOT ONE THAT MAY BE APPROPRIATELY RESOLVED BY THIS COURT. THE FEDERAL COURT DOES NOT HAVE THE JURISDICTION TO

ENFORCE A STATE LAW OR RULE UNLESS A FEDERAL RIGHT IS BEING VIOLATED. OBVIOUSLY, BY NOW IT IS CLEAR THAT PLAINTIFF'S STATE-CREATED LIBERTY INTEREST WAS VIOLATED, THUS, LIBERTY INTERESTS ARE FEDERALLY PROTECTABLE UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION PER THE FOURTEENTH AMENDMENT.

FURTHERMORE, THIS COURT IS BOUND BY THE STATE LEGISLATURES DICTATION OF RULE-MAKING PROCEDURE AND THE JUDGEMENTS OF THE HAWAII STATE SUPREME COURT PURSUANT TO 28 U.S.C.A. § 1738. *PIATT VS. MACDOUGALL*, 773 F.2D 1032 (9TH CIR. 1985). THIS COURT HAS JURISDICTION BECAUSE CHAPTER 91 § 91-7(B) DOES NOT LIMIT A DECLARATION OF THE RULE INVALID TO STATE COURTS, IT STATES: "THE COURT SHALL" . . . AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT PROTECTS EVEN PRISONERS FROM BEING DISCRIMINATED FROM RELIEF OF ARBITRARY GOVERNMENT CONDUCT.

[MATERIAL DELETED]

RETALIATION

PLAINTIFF OBJECTS TO THE MAGISTRATE'S R AND R REGARDING RETALIATION. THE MAGISTRATE CLAIMS THAT HIS COMPLAINT HAS VAGUELY AND CONCLUSORILY CLAIMED THAT DEFENDANTS HAVE "RETALIATED" AGAINST HIM IN VIOLATION OF UNSPECIFIED RIGHTS.

TO THE CONTRARY PLAINTIFF'S CLAIM OF RETALIATION IS CLEAR, WHICH IS, THAT VARIOUS DEFENDANTS RETALIATED AGAINST PLAINTIFF BECAUSE OF HIS WORK AS A JAIL HOUSE LAWYER. RETALIATION BY PRISON OFFICIALS AGAINST JAIL HOUSE LAWYERS HAS LONG BEEN A VIOLATION OF THE INMATES FEDERALLY PROTECTED RIGHTS UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION. *SEE BRIDGES VS. RUSSELL* 757 F.2D 1155 (11TH CIR. 1985) WHERE IT WAS FOUND THAT PRISON OFFICIALS MAY NOT RETALIATE FOR PRISONERS' EXERCISE OF PERMISSIBLE FIRST AMENDMENT FREEDOMS.

PRISON INMATES RETAIN FIRST AMENDMENT RIGHTS WHICH DO NOT CONFLICT WITH LEGITIMATE PENAL OBJECTIVES. *SEE PELL VS. PROCUNIER*, 417 U.S. 817, 94 S.CT. 2800 (1974); *PROCUNIER VS. MARTINEZ*, 416 U.S. 396, 94 S.CT. 1800 (1974); *DAVIDSON VS. SCULLY*, 694 F.2D 50 (2ND CIR. 1982).

THUS, IT IS CLEAR THAT PLAINTIFF'S RETALIATION CLAIM IS *NOT* VAGUE AND THAT THE VIOLATIONS ARE IN DONE [sic] AGAINST PLAINTIFF'S FIRST AMENDMENT RIGHT.

THEREBY, THERE IS A MATERIAL FACT WHICH CANNOT BE RESOLVED AT THIS POINT, WHICH IS, WAS THE ACTIONS OF THE NAMED DEFENDANTS DONE FOR THE PURPOSE OF RETALIATING AGAINST PLAINTIFF BECAUSE OF HIS CHOICE TO EXERCISE HIS RIGHT TO SEEK REDRESS FROM GOVERNMENT?

THE MAGISTRATE CLAIMS THAT PLAINTIFF'S CLAIMS OF RETALIATION ARE NOT SUPPORTED. ON

THE CONTRARY, THE INFERENCES FROM THE DEFENDANTS', WHOM ARE ACCUSED OF RETALIATION, SILENCE ON WHETHER OR NOT THEY CONDUCTED THEMSELVES AGAINST PLAINTIFF TO VIOLATE HIS FIRST AMENDMENT RIGHT TO SEEK GOVERNMENT REDRESS OF HIS GRIEVANCES, ARE AN INDICATION THAT THE [sic] IS SOME CREDIBILITY TO PLAINTIFF'S CLAIMS. THE DEFENDANTS DO NOT DISPUTE PLAINTIFF'S CLAIMS. INSTEAD THEY ERRONEOUSLY CONSTRUE PLAINTIFF'S CLAIMS AS VAGUE AND CONCLUSORY.

IT MUST BE REMEMBERED THAT INFERENCES FROM THE FACTS MUST BE DRAWN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY. *T.W. ELECTRICAL, INC. VS. PACIFIC ELECTRICAL CONTRACTORS ASS'N*, 809 F.2D 626, AT 631.

TAKE FOR INSTANCE THE EXAMPLE THE MAGISTRATE USED TO SHOW THAT PLAINTIFF'S CLAIM[S] IS VAGUE AND CONCLUSORY. HE STATES: . . . "IN HIS COMPLAINT AT PARAGRAPH 41 HE STATES THAT DEFENDANT SEQUEIRA RETALIATED AGAINST HIM WHEN DEFENDANT SEQUEIRA TOLD PLAINTIFF, IN A GRIEVANCE RESPONSE, ON JUNE 23, 1987, "YOUR BEHAVIOR PREDICATES ADVANCEMENT TO MODULE 'B'." THE MAGISTRATE GOES FURTHER TO DISPUTE PLAINTIFF [sic] CLAIM BY STATING:

(ACCORDING TO PLAINTIFF, HE HAD "HELD A VIRTUAL POSITIVE BEHAVIOR SINCE HIS ARRIVAL TO HHSF IN SEPTEMBER 3, 1985." THIS OF COURSE IS

NOT TRUE. HOWEVER, PLAINTIFF DOES NOT DISPUTE THAT HE PLEADED GUILTY TO ASSAULTING ANOTHER INMATE ON JANUARY 1, 1987.)

FIRST OF ALL, PLAINTIFF'S CONTENTION THAT, "HE HELD A VIRTUAL POSITIVE BEHAVIOR SINCE HIS ARRIVAL TO HHSF IN SEPTEMBER 3, 1985.", IS A *FACT! SEE* EXHIBIT "C" ATTACHED TO DEFENDANTS MOTION FOR SUMMARY WHERE THIS COURT WILL FIND – AS PLAINTIFF STATED – THAT THERE ARE ONLY ONE MISCONDUCT FILED AGAINST PLAINTIFF WITHIN THE DATE OF PLAINTIFF'S ARRIVAL TO HHSF, WHICH IS, SEPTEMBER 3, 1985 AND AUGUST 28, 1987, WHERE HE WAS FOUND GUILTY OF MISCONDUCT AND THAT IS ON JANUARY 1, 1987.

JUST *ONE* SINGLE MISCONDUCT, AND UNLIKE THE MAGISTRATE'S CLAIM PLAINTIFF *DID NOT* PLEAD GUILTY TO ASSAULT, HE PLEAD GUILTY TO FIGHTING! *SEE* EXHIBIT "J" ATTACHED TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT.

PLAINTIFF SAID "VIRTUAL" BECAUSE HE KNEW THAT BETWEEN THOSE DATES CITED HE WAS FOUND GUILTY OF *ONE* MISCONDUCT. NOW, TO FURTHER PROVE THAT PLAINTIFF DID HOLD A "VIRTUAL" POSITIVE BEHAVIOR: PLAINTIFF REFERS THIS COURT TO THE ENTRIES LISTED ON EXHIBIT "C", SUPRA, BETWEEN SEPTEMBER 3, 1985 AND AUGUST 28, 1987. THEY ARE:

1.) SEPTEMBER 3, 1985: ADMITTED TO HHSF ON INTAKE PLACEMENT STATUS PENDING ASSESSMENT;

2.) SEPT. 5, 1985: PLACED IN MODULE "A"

3.) OCT. 1, 1985: TRANSFERRED TO MODULE B DUE TO HOUSING SHORTAGE

4.) OCT. 18, 1985: RELIGIOUS COUNSELING APPROVED ON FRIDAYS WITH HARRY FUJIHARA;

5.) DEC. 5, 1985: APA: APPROVED FOR RELIGIOUS COUNSELING WITH MR. CHEE AND MR. SOUZA EVERY THURSDAY, EXCLUDING HOLIDAYS, FROM 9:15AM TO 10AM;

6.) RECLASSIFICATION: S-5/MAX.; (DEC. 13, 1985)

7.) MAR. 7, 1986: APA – TRANSFER TO MODULE C;

8.) MAR. 7, 1986: APA – PLACED ONTO MODULE C FLOOR BOY WORKLINE;

9.) APRIL 17, 1986: APA – TRANSFERRED FROM MODULE C FLOORBOY TO KITCHEN WORKLINE;

10.) AUGUST 1986: APPROVED FOR BIBLE CORRESPONDENCE COURSE;

11.) DEC. 13, 1986: RECLASSIFICATION: REMAIN AT S-5/MAX.;

12.) JAN. 15, 1987: MISCONDUCT – PLEAD GUILTY TO CHARGE INCURRED ON JAN. 1, 1987;

13.) JAN. 30, 1987: END OF SEGREGATION PLACED ON PHASE ONE;

14.) FEB. 9, 1987: *EARLY REVIEW* ON PHASE I. PLACED IN GENERAL POPULATION OF MODULE A;

15.) FEB. 20, 1987: RELIGIOUS COUNSELING APPROVED WITH HENRY CHEE;

16.) APRIL 28, 1987: MISCONDUCT REPORT – *FINDINGS – NOT GUILTY*;

17.) AUGUST 25, 1987: MISCONDUCT (ISSUE OF ORIGINAL COMPLAINT IN THIS CASE AND AMENDED)

WITH SEVENTEEN ENTRIES *ALL* POSITIVE SAVE ONE GUILTY FINDING OF MISCONDUCT AND THE MAGEISTRATE SAYS PLAINTIFF'S "VIRTUAL" CLAIM IS UNTRUE. THE FACTS SPEAK FOR THEMSELVES! EVEN IN THE CASE OF THE JAN. 15, 1987 ENTRY PLAINTIFF *ACCEPTED* RESPONSIBILITY FOR HIS ACTIONS – A POSITIVE POSITION! HE EVEN RECEIVED AN EARLY REVIEW OF HIS PHASE I SATTUS AFTER ONLY NINE DAYS (MOST PEOPLE STAY AT LEAST 30 DAYS ON PHASE I) AND TRANSFERRED TO MODULE A! PLAINTIFF MUST HAVE BEEN DOING SOMETHING RIGHT.

YET, FOR ALL HIS POSITIVE BEHAVIOR, DEFENDANT SEQUEIRA HINDERED PLAINTIFF'S ADVANCEMENT THOUGH THE PHASES *ONLY* BECAUSE OF HIS BEHAVIOR? DEFENDANT SHOHET'S AFFIDAVIT ATTACHED AS EXHIBIT "E" TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT CLEARLY STATE:

". . . WHEREBY INMATES DEMONSTRATING SATISFACTORY ADJUSTMENT MOVE UP TO THE NEXT PHASE AND GAIN GREATER PRIVILEGES . . . HIS PROGRESS IS BASED UPON HIS BEHAVIOR WHICH

DETERMINES HOW RAPIDLY OR SLOWLY HE MOVES THROUGH THE SYSTEM." . . . (PAGE 2)

THUS, WITH DISCOVERY OF OTHER INMATE CASES BETWEEN JAN. 1, 1987 AND THE DATE OF DEFENDANT SEQUEIRA'S RESPONSE TO PLAINTIFF IN THE GRIEVANCE, PLAINTIFF BELIEVES THAT HE WOULD BE ABLE TO SHOW THAT HIS RECORD IN H.H.S.F. UP UNTIL THAT POINT WAS BETTER THAN THOSE INMATES WHO WERE ADVANCED TO THE NEXT HIGHER LEVEL OF THE PROGRAM. PLAINTIFF WOULD ALSO SHOW THAT NONE OF THOSE INMATES WHO WERE ADVANCED WERE "GRIEVANCE WRITERS", WHICH PLAINTIFF HAD BECOME WHILE IN SEGREGATION FOR THE JAN. 1, 1987, MISCONDUCT. THUS, SHOWING THAT DEFENDANT SEQUEIRA'S RESPONSE WAS DIRECTED TO PLAINTIFF'S EXERCISE OF HIS FIRST AMENDMENT RIGHT TO FILE GRIEVANCES AGAINST PRISON OFFICIALS, WHICH HE WAS INCREASINGLY DOING. AND LIKE OTHER JAILHOUSE LAWYERS, PLAINTIFF WAS "KEPT BACK" FROM ADVANCEMENT FOR ARBITRARY REASONS.

PLAINTIFF IS NOT SAYING HE HAS A RIGHT TO ADVANCE. HE IS SAYING THAT ACCORDING TO DEFENDANTS OWN RULES HE COULD NOT BE KEPT BACK IF HIS BEHAVIOR WAS "SATISFACTORY". DEFENDANT SEQUEIRA'S MOTIVES WERE RETALIATORY.

BUT, PLAINTIFF RECEIVED NO DISCOVERY. THE MAGISTRATE SUSPENDED DISCOVERY PENDING SUMMARY JUDGEMENT. THUS, PLAINTIFF IS NOT

PREPARED TO DEFEND SUMMARY JUDGEMENT ON THIS ISSUE OF RETALIATION AS HE NEEDS TO UNDER GO DISCOVERY TO DRAW A CONTINUOUS CONNECTION BETWEEN EACH DEFENDANT TO SHOW BY PREPONDERENCE [sic] OF EVIDENCE THAT: 1.) A CONSPIRACY TO HARASS/RETALIATE AGAINST PLAINTIFF FOR HIS JAILHOUSE LAWYER ACTIVITIES EXISTS AND/OR THAT EACH DEFENDANT THOUGH NOT CONSPIRING TOGETHER, DID RETALIATE AGAINST PLAINTIFF ON THEIR OWN – BECAUSE OF HIS WORK AS A JAILHOUSE LAWYER. THEREBY, BECAUSE OF THE COMPLEXITY OF THIS "RETALIATION" ISSUE AND BASED ON THE FOREGOING, THIS COURT SHOULD DENY DEFENDANTS SUMMARY JUDGEMENT ON THIS ISSUE AND REMAND FOR DISCOVERY.

REMAINING ISSUES PRESENTED IN SUMMARY JUDGEMENT

PLAINTIFF OBJECTS TO EVERY OTHER ISSUES [sic] PRESENTED IN SUMMARY JUDGEMENT THAT THE MAGISTRATE RECOMMENDS IN FAVOR OF DEFENDANTS. HE OBJECTS BASED ON THE FOLLOWING REASONS:

1.) THE MAGISTRATE'S REPORT AND CONTENTIONS ARE ERRONEOUS;

2.) THAT PLAINTIFF, BECAUSE OF THE LACK OF SUFFICIENT TIME TO PREPARE AN ADEQUATE OBJECTION, CANNOT SUFFICIENTLY RESPOND TO

ALL OTHER ISSUES RAISED ON SUMMARY JUDGEMENT. *SEE* AFFIDAVIT OF DeMONT R.D. CONNER ATTACHED.

ISSUES NOT RAISED IN SUMMARY JUDGEMENT

THERE ARE STILL OTHER ISSUES THAT HAVE NOT BEEN DEALT WITH IN SUMMARY JUDGEMENT. PLAINTIFF DOES NOT ABANDON THEM AND REQUESTS THIS COURT TO ORDER MAGISTRATE TO SET THOSE ISSUES ON A COURSE FOR TRIAL.

OTHER OBJECTION

PLAINTIFF OBJECTS TO THIS COURT'S RECENT ORDER MANDATING THAT PLAINTIFF FILE HIS OBJECTIONS BY *JUNE 10, 1991*. THIS IS NOT ENOUGH TIME AS PLAINTIFF DOES NOT HAVE OPEN ACCESS TO LAW LIBRARY AND XEROXING AT "ANY TIME HE WANTS". THE DEFENDANTS HAVE RULES AND SET SCHEDULES THAT THEY STICK BY AND PLAINTIFF WAS MANDATED BY MAGISTRATE TOKAIRIN TO FILE A RESPONSE TO HIS ORDER BY *JUNE 5, 1991* OR HE WOULD DISMISS PLAINTIFF'S PETITION IN *CONNER VS. OKU*, CIVIL NO. *87-410ACK*. THUS, PLAINTIFF WAS SWAMPT [sic] IN LOADS OF PAPERWORK, WITH LITTLE RESOURSES [sic] TO WORK WITH.

PLAINTIFF SHOULD NOT BE HELD TO THE STRICT STANDARDS OF AN ATTORNEY AS ATTORNEYS HAVE ACCESS TO LAW LIBRARY AND XEROXING AT THEIR FINGER TIPS *AND* THEY MAY-AT-WILL EMPLOY THE SERVICES OF OTHER ATTORNEYS.

PLAINTIFF HAS NONE OF THESE. NEITHER DOES PLAINTIFF HAVE THE EDUCATION OF ATTORNEYS. HE IS A LAY-MAN WITH A NOW 11.5 GRADE AVERAGE, NOTWITHSTANDING HIS DIPLOMA. HE NEEDS AT LEAST ENOUGH TIME TO MAKE COPIES OF HIS OBJECTIONS. AS A RESULT THIS IS THE ONLY COPY/ ORIGINAL. HE WILL SEND IT TO THE COURT AS IS BECAUSE HE IS UNDER ORDER TO FILE HIS OBJECTIONS BY *JUNE 10, 1991*.

DATED: HONOLULU, HAWAII, JUNE 6, 1991.

/s/ DeMont R.D. Conner
DeMONT R.D. CONNER,
PRO SE
99-902 MOANALUA HWY.
AIEA, HAWAII 96701
